

AN
ENQUIRY

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INTO THE
DOCTRINE,
LATELY PROPAGATED,
CONCERNING
LIBELS, WARRANTS,
AND THE
SEIZURE of PAPERS;

WITH A
VIEW to some late PROCEEDINGS,
AND THE
DEFENCE of Them by the MAJORITY;
UPON THE
PRINCIPLES of LAW and the CONSTITUTION.

IN A
LETTER to Mr. *Almon* from the Father of
Candor.

Almon (John)

*The Child may rue, that is unborn,
The Hunting of that Day.*

CHEVY CHASE.

DUBLIN:

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J. EXSHAW. M,DCC,LXV.

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ENQUIRY, &c.

S I R,

SOME weeks after my son's sending you *A Letter to the Publick Advertiser*, I was surprized with the sight of a * pamphlet wherein a contrary doctrine in very material points is conveyed, altho' I cannot say directly affirmed; from which last circumstance I guess it to be the work of some daring and enterprizing Attorney, here and there retouched by his superior. Be this as it may, I think it not improper to consider what has been advanced by this extraordinary writer, altho' I shall go more at large than he has done into the subject, and even differ in some things from my son himself, whose notions in several respects are too novel and modern for my approbation.

The Attorney begins like himself, by reproaching others with "wretched quibbling upon words, misrepresentation, ignorance, blundering and falsehoods," and then represents himself and his friends as "reasoning men, of knowledge, integrity and ability;" but I suspect nevertheless, from the sophistry and refinement one now and then meets with in his argumentation, that he has had the assistance of another man "who has been taught to think himself a Statesman, and who would be too happy to be able to think himself a minister," and to whom I shall only say, as he loves a classic.

Vane *Ligur*, frustra que animis elate superbis,
Nequicquam *patrias* tentasti lubricus artes.

* The Majority defended.

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I shall not dispute the knowledge or ability either the one as a dexterous Common-lawyer, or of the other as a versatile Logician; and as to public integrity, they need so little be questioned, that it would be now-a-days the idlest of pastimes in any man to urge a syllable upon that head concerning either. The Attorney however, I must say, has ventured to assert in print, what I do not remember to have heard any one gentleman avow in parliament, and for that reason, among others, has attracted my notice and indignation.

Upon this occasion, I shall not treat the subject in the perfunctory manner he has done, nor intirely pursue his method, and therefore shall only advert to what he has said as he happens to fall in my way. Indeed, the discourse of late has run so much upon libels, warrants, and resolutions of parliament, that every body's thoughts have been naturally and involuntarily turned to these points. For my own part, I shall endeavour to offer what I have to say with clearness, and according to law, altho' it is long since I have quitted the bar, and to express myself with that freedom and plainness which becomes the member of a free state. I do not think myself at liberty to scan the private actions of any man, but have a right to consider the conduct of every man in public; and to approve or to condemn his doings as they appear to me to be calculated, either for the good or the hurt of his country. In atchieving this, I am well aware that I shall run-counter to many fashionable doctrines; but my age exempts me from any particular delicacy or false complaisance in that respect. Nevertheless I should not peradventure have gone so far as I have done, were it not by way of gentle and indirect remonstrance to my son, who seems to me to be somewhat infected by the general turn of the times, maugre the legal education I have given him.

In this lettered age I shall not parade on the general principles of government, but slightly touch a few features relative to our own, as a necessary ground-work for what I shall afterwards advance. Having premised this, I shall begin with declaring, that a King of England, as I take it, is to be considered in two respects. In his private capacity, he may, as a man, indulge his own particular inclinations with regard to the establishment of his household, and the choice of his immediate servants. The kingdom at large is not at all concerned in these domestic regulations. In his public capacity, he is wholly a creature of political compact, and maintained as such by the community;

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constituting a part of the legislature, and the executive hand of the whole. In this view he is to be the common protector and father of all the people. The person of every subject must be indifferent to him, and he can have no particular interest of his own. His ministers are the servants of the state, and his sole object is the common weal. In order however to preserve a reverence to the crown which he wears, and a due majesty to his person, the royal name is never to be introduced into any discourse of public transactions, and from hence the allowed maxim, *The King can do no wrong*. In short, he is to be named in all acts of government, but to be responsible in his own proper person, for none; as doing nothing of himself, but every thing by the advice of his council and ministers. The speeches from the throne; treaties of peace and war; the application of public revenue; appointments to offices in the state; the direction of crown-prosecutions, and, in a word, every other act of government must be always debated, questioned, and blamed as the acts of the minister. As there is nothing that can be done but what somebody is to be accountable for it to the public, so every minister in his department is to be responsible accordingly, and to act at his peril.

This being so, there is certainly no inseparable connection between a minister and the sovereign. The latter is not by the duty of his office, to support any one man against the general sentiments of his people; and of course whatever is said or written against the administration is not to be regarded as an attack upon his throne. Indeed, were it otherwise, no act of a minister could ever be arraigned, and no liberty of the press exist; for, every inquiry, clamour and censure made to the world, in print, would be sowing sedition, if not high treason, in the state.

• By the old constitution, and afterwards by Magna Charta, no man could be put upon his trial for any offence, until a grand Jury had found a bill of indictment, or of their own knowledge, made a presentment thereof; and then the person so charged, was to be tried upon that indictment or presentment by a petit Jury of his Peers. By degrees however, and by virtue of particular statutes, crimes against the peace became presentable by conservators or justices of the peace, and the persons accused were to be tried thereupon by a petit Jury. In process of time, some few offences under special acts of parliament came to be prosecuted by information; and, in some very enormous cases, the court of *King's-bench*, upon motion in open

court supported by affidavit, and opportunity given to the party charged to defend himself, would sometimes grant leave for filing an information. A Jury was afterwards to try the truth of every such charge. But, Henry the 7th, one of the worst Princes this nation ever knew, procured an act of parliament which, after reciting many defects and abuses in trials by Jury, and pretending a remedy for the same, gives a summary jurisdiction to certain great officers of state, taking to their aid a bishop, to summon, try and punish, of their own mere discretion and authority, any persons who shall be accused of the offences therein very generally named and described. In short, the court of Star-chamber is, by this act, so enlarged in its jurisdiction, that it may be said to be erected, and both grand and petit Juries in crown matters are in great measure laid aside, as the Attorney-general now brings every thing of that sort before this court, which, by its constitution, never can make use of either. In lieu of an indictment or presentment of their peers, or informations by leave of the King's-bench after hearing both parties upon affidavits, people of all degrees are now put on their trial by a charge framed at the pleasure of the Attorney-general, called an information, and filed by him without even the sanction of an oath, or the leave of any court whatever; and the Star-chamber decide thereupon most conscientiously, but as most true courtiers would wish to do, without the intervention of any Jury at all. The faces of the subject are so ground by this proceeding, that every body at length is alarmed, and the people in struggling with the crown happening to get the better, the patriots of the time seized an occasion, towards the latter end of the reign of Charles the First, to extort from that martyr to obstinacy, an act for the abolition of this most oppressive and intolerable jurisdiction. But, by some fatality or other, the method of proceeding by an Attorney-General's information, filed at discretion without oath, an offspring of the Star-Chamber, was over-looked and suffered still to remain, and the use that is now commonly made of it every body knows. It is reported, however, that my Lord Chief Justice Hale had so little opinion of the legality of this kind of informations that he used to say, " If ever they came in dispute, they could not stand, but must necessarily fall to the ground." Indeed, there is this very dreadful circumstance attending this mode of prosecution, that as the Attorney-General can file an information for what he pleases, and the Crown never pays any costs, so it is in the power

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power of this Officer of the Law to harrass the peace of any man in the realm, at his pleasure, and put him to a grievous expence, without ever trying the matter at all, and without any possibility of redress or retaliation. Most Booksellers and Printers know this very well, and hence so few of them can be got to publish any stricture whatever upon any Administration, dreading this arbitrary scourge of the Crown, and regarding the same as a perpetual injunction, and as terrible as a drawn sword suspended by a thread, hanging over their heads. The oppression, however, can go no farther, unless, indeed, securities for the peace be demanded, and that can only be in actual breaches of the peace, threatening the death or bodily hurt of somebody; for, if the trial proceeds, that security of Englishmen's rights, a Jury, must be called in. Some late statutes, however, (I should just observe) in particular instances have given a summary and final jurisdiction to Justices of the Peace, in matters of Excise, Game, &c. where the proceedings and decisions are arbitrary, vexatious and partial enough I believe; but this does not reach to such a length as to endanger, perhaps, the Constitution itself.

There is, I fancy, no offence which is oftener prosecuted by an information, *ex officio*, than a libel. Now, many Judges before the Revolution, and perchance some since, have said that, in law, a paper may be a libel, whether the imputations, assertions and charges in it be true or false, and be against a good or a bad man, the living or the dead; nay, that the truth of it is even an aggravation of the crime: that every libel is, by construction of law, against the peace, and (in very late times) that it is even an actual breach of the peace; and (at last) that securities for the good behaviour may truly be demanded of any man, only charged *ex officio* by an Attorney-General with being the Author, Printer or Publisher of a libel. After all this, however, I do not yet learn by what certain signs one can know whether any particular pamphlet or paper will induce any body to commit a breach of the peace, so various are mens ways of thinking, from humour and party, concerning this and many other matters of mere speculation, or rather divination.

I think one may say, without straining the truth of the Lawyers, who have thus matured the doctrine of informations, that they have been very industrious and astute in the forging of chains, if not for themselves, for the rest of mankind, at least, and for all our posterity. Nothing, indeed, can be added to these chains, by way of rivet, but

the revival of a position, to be met with likewise in some few cases before the Revolution, that a Jury is only to try the fact of publication, and must leave the law, that is the sense and intention of the words, to the Court, for their construction; unless, indeed, it could be contrived to get rid of Juries intirely, that is, to establish in perfection the Star-Chamber anew. Already, almost any thing that a man writes may, by the help of that useful and ingenious key to construction, an innuendo, be explained to scandalize Government, and of course be a libel; and could the last mentioned impediments be totally removed, instead of being only now and then got the better of by the dexterity of a Judge, no writing whatever could possibly escape conviction.

Informations *ex officio*, it was long thought, could only be filed where the King was immediately concerned, and so the old books say; but, it is now certain that they are not confined or limited by any thing besides the discretion of the Attorney-General himself. Infomuch, that at present I do not know what may not be deemed a proper subject for such a caustic, and, in the eye of so sharp-sighted an Officer, a libel. They may, in time, become an ordinary and political engine of Administration, as much as any Gazette or common Courier. Indeed, the ease and certainty of laying a man under a heavy prosecution in the Crown-Office, without any controul, by this mode of information, are what render it much more formidable than the common, regular, old information, which can only be filed by leave of the King's-Bench, after a public hearing of both sides, upon affidavit, in open Court. It is a power that is, in my apprehension, very alarming; and a thinking man cannot refrain from surprize, that a free people should suffer so odious a prerogative to exist. It has been, and may most certainly be again, the means of great persecution. In truth, it seems to be a power necessary for no good purpose, and capable of being put to a very bad one. For, although a man may doubt whether a Grand Jury, in times of violent party, would always find a bill of indictment or present, yet there can be none but that a Court of *King's-Bench* would grant an information, wherever it could, by any Administration, be applied for with the least foundation or colour of reason. It is still more wonderful that, since this prerogative of filing an information at pleasure is endured, there has been no Act passed to subject the Attorney-General, provided he did not pursue his information, or upon trial was non-suited, or had a verdict against him,

to the payment of full costs to the party so causelessly aggrieved.

However, the exercise of such an unnecessary and grievous prerogative, lays a strong foundation for a Jury's retaining the privilege of determining both the law and the fact, with respect to libels. This has, I know, been a much agitated question; but I am clear in my own opinion, not only that they have a right so to do, but that it is necessary they should exercise it. Indeed, it is only in conformity with common parlance, that I speak of law and fact in libel as distinct things, for to myself they appear to be inseparably united. A criminal prosecution and trial, can only be had for a crime; now, the mere simple publication of any thing not libellous (there being no public licenser) is no crime at all: it is then the publication of what is false, scandalous and seditious, that is the crime, and solely gives jurisdiction to the criminal Court; and that therefore is what must, of necessity, be submitted to the Jury for their opinion and determination, after hearing the evidence and construction of Council, and a due consideration thereof. A decisive argument to the same purpose may be drawn from the conduct of the Lawyers themselves in this very matter. For, after the King's-Bench, upon consideration of any paper, has awarded an information against it for being a libel, it is agreed on all hands, to be necessary in law for the Crown-Pleader, in his information, to set forth specially the paper, and to charge it to be a false or malicious libel. Now, this would never be done by the Law-Pleaders, submitted to by the Attorney-General, or endured by the Judges, if it was not essential to the legality of the proceeding. So that, in short, the King's-Bench in granting the information only act like a Grand Jury in finding a bill of indictment, and in effect say no more than this, That so far as appears to them the paper charged seems to be a libel, and therefore they think the person accused should be put upon his solemn trial for the same before a Jury, whose business it will be to enter thoroughly into the matter, hear the evidence examined, and what the Council can say on both sides, and form a complete judgment upon the whole; which, after such a discussion, it will not be difficult for any men of common understanding to do, they being as able to judge of the truth and intent, *or quo animo*, a paper was written, as the most learned or most logical gentleman that ever lived. Whether the contents of the paper published be true, or false or malicious, is a fact to be collected from circumstances,

stances, as much as whether a trespass be wilful or not, or a murder committed with malice prepense. Were I therefore a Juror, I should take nothing implicitly or upon trust, in this respect, from any man; but should endeavour to form my own judgment of the matter as an impartial Juror, and not as a Statesman; plain truth and fact, and common sense, and not political convenience, far-fetched inference, or ingenious innuendo, being the proper object and intent of my oath by the law of the land. The strict law I know is pretended to be, that the truth of the matter asserted is no defence against the charge of its being a libel; but that is a point, especially in an information filed *ex officio*, for reflections on a public measure, which I shall never be prevailed upon to receive as law from the authority of any man whatever.

If an Attorney-General finds it necessary in law to charge a paper to be false, in order to render his information against it, as a libel, legal; and that his informing against it for being a *true* libel, would not only be ridiculous, but bad in law; he should prove it to be false, or I would never upon my oath find it to be so, let what measure or what magistrate soever be the object of it; in reality, it would be absurd to do otherwise. I should go farther; for, the crown should not only prove it to be true, but likewise shew, either from the nature of the paper itself, or from external proof, that it was malicious as well as false, or I would acquit the defendant. For, if this were not likewise requisite, it might very well happen, that a sober and temperate man, who wrote very justly upon the whole against a bad ministry, upon true principles of the constitution, might have been misinformed, notwithstanding the most industrious investigation, touching some particular fact; and then the Attorney-General, after admitting or not contesting twenty other charges, might lay his finger upon this single one, and shew it to be ill-founded and false, and thereupon insist upon having maintained and made good his information. In such case, I should consider upon the circumstances of the matter, whether it was either maliciously or wantonly that the author had published such an untruth, and whether common sense supported him in it, and should acquit or condemn him accordingly. A malicious, or even a wanton charge, against any minister or magistrate, is, I agree, highly condemnable, and ought to be severely punished; but, before I could, upon my oath, bring in any man a libeller, it must be very satisfactorily made out, that what he had published was both false and malicious; for, com-

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mon fame has been resolved to be a good ground of accusation.

In short, the whole of the information is given in charge to the Jury, and if they find him guilty at all, they must find him guilty of the whole; that is, that by publishing such paper he is guilty of a libel; and if they do find this, it is not in the power of the King's Bench afterwards to determine that the same was no libel. At least, therefore, the charge both of the falshood and the malice of the paper accused, as well as the fact of publication, should be made appear, or the author and publisher should be acquitted.

Judge *Powell*, in the trial of the Seven Bishops, speaking of their petition, which was charged as a libel in the information, said, "To make it a libel, it must be false and malicious, and tend to sedition;" and declared, "As he saw no falshood or malice in it, that it was no libel." The other three Judges, it is true, were of a different opinion; but their opinion has ever since been held infamous, and his in the utmost veneration, and will send down his name with honour to posterity, so long as history lasts. Indeed, Sir *Robert Sawyer* went still further, and as Council insisted, in the same trial, that "the falsity, the malice, and *sedition* of the writing, were *all* facts to be proved." And it is said, that Lord Chief Justice *Holt* always asked "Can you prove this to be true?" If you write such things as you are charged with, it lies upon you to prove them true, at your peril; and, in my opinion, a man runs risk enough in being forced to do this.

Besides these legal reasons, there is a great leading political and constitutional reason, of infinite moment to a free people, Why a Jury should of themselves always determine whether any thing be or be not a libel. It is this; that ninety-nine times out of a hundred, these Informations for public libels are a dispute between the ministers and the people; and it is, in my conscience, this very circumstance which has made our ancestors retain to themselves the power of determining both as to the law and the fact, with respect to libels, altho' they have waved or ceded to the Judges the power of determining the law in all other respects. Having acquiesced in the power exercised by the Attorney-General, of informing against what he pleases as a libel, they were resolved not to part with the prerogative of judging finally upon the whole matter themselves. This was a privilege they would never

ver part with out of their own hands, whatever they delegated besides; and, in my poor opinion, had they done so, we should, long before this, not only have lost the liberty of the press, but every other liberty besides. No man, that disapproved the measures of a court, would venture to discuss the propriety or consequence of them. No man would venture to utter a syllable in print against any power of office, and much less against any royal prerogative, however illegally usurped. He would be sure to be charged with a libel by the Attorney-General, and to be fined and perhaps imprisoned without mercy by the *King's Bench*, as, in fact, happened to Sir Samuel Bernardiston, whose judgment was reversed by parliament after the Revolution. Before that glorious æra, the Judges held their places at the King's pleasure, and acted accordingly. Their oath was then their only restraint, and any man, who attentively reads That, may see it was calculated more for the support of the prerogative of the King, than of the rights of the subject. An oath, however, was some guard, but not a sufficient one, when the consequence of a non-compliance with administration would deprive a Judge of his livelihood, and raise also the indignation and resentment of the Crown. Judges are now for life, it is true, and a noble security it is; and yet, unless one could insure them also from the common failings of mankind, from ambition, the desire of promoting their children, or, if they have no children, of providing for their nephews, one may easily conceive that, in less virtuous times than the present, some influence may still take place even in a Judge. The mere desire of obliging one's friend's, which is incident to humanity, will insensibly warp the very best mens minds, and be apt to give an improper bias to their judgment.

But, it is now become more necessary than ever, that the people should retain the privilege of determining the law and the fact, relative to libels, because their representatives have lately, by a resolution, declared, that *privilege of parliament does not extend to the case of a libel*. I had, I must confess, been always in an error upon this head before, which I was led into by old cases. My notion was not lately taken up in consequence of the construction made of those old cases by the present Court of Common Pleas, in determining the same point, nor did I, indeed, entirely build upon my own construction of the matter; but I was fixed in the opinion by the authority of that great lawyer Lord Chancellor *Egerton*, who, after having held the great seal for fourteen years, with greater reputation than any man before him, in a solemn argument which

which he delivered in the case of the *Pest Nati*, and which he afterwards published himself, upon a strict review, and with great deliberation, (so that it is uncontrovertibly his opinion) I as laid down the same doctrine, and cites particularly the determination made by the Judges in the case of Thorpe. His Lordship there says, " Then let us see " what the wisdom of parliaments in times past, attributed " to the Judges opinions declared in parliament, of which " there may be many examples; but I will trouble " you but with two or three. In the parliament anno 31 " H. 6, in the vacation (the parliament being continued " by prorogation) *Thomas Thorpe*, the Speaker, was condemned in a thousand pounds damages, in an action of " trespass brought against him by the Duke of York, and " was committed to prison in execution for the same. " After, when the parliament was re-assembled, the Commons made suit to the King and the Lords, to have " *Thorpe*, the Speaker, delivered, for the good exploit " of the parliament; whereupon the Duke of York's " counsel declared the whole case at large. The Lords " demanded the opinion of the Judges, whether, in that " case, *Thorpe* ought to be delivered out of prison by privilege of parliament: the Judges made this answer, " That they ought not to determine the privilege of that " High Court of Parliament; but, for the declaration of " proceeding in lower courts, in cases where writs of superseas for the privilege of the parliament be brought " unto them, they answered, That if any person that is " a Member of Parliament be arrested, in such cases as " be not for treason or felony, or for *surety of peace*, or " condemnation had before the parliament, it is used that " such persons be released, and may make attorney, so as " they may have their freedom and liberty freely to attend " the parliament."

Now what my reasoning from such premises must be, may be easily guessed. It was thus: Members are clearly intitled to Privilege in all misdemeanours, for which sureties of the peace cannot be demanded. But, sureties of the peace cannot be demanded but in actual breaches of the peace. The writing of any thing quietly in one's study, and publishing it by the press, can certainly be no actual breach of the peace. Therefore, a Member who is only charged with this, cannot thereby forfeit his Privilege. This was my course of argument. For, I thought that no common man would allow any quiet writing or publishing, especially where extremely clandestine, to be in the editor any breach of peace at all; and that it could
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be none but in lawyers, who, on account of the evil tendency sometimes of such writings, had first got them, by *construction*, to be deemed so. Nevertheless, I had no idea myself that it was possible for any lawyer, however subtle and metaphysical, to proceed so far as to decide mere authorship, and publication by the press, to be an *actual* breach of the peace, as This last seemed to express, *ex vi termini*, some positive bodily injury; or some immediate dread thereof at least; and that, whatever a challenge, in writing, to any particular might be, a general libel upon public measures, could never be construed to be so. As this was inconceivable to me, and I knew it was not required of any one, in matters of law, to come up to the faith of an orthodox divine, who, in incredible points is ready to say, *Credo quia impossibile est*; so I believed as a lawyer, that is, as my own understanding would let me. But, I now find I have been all along my own dupe in the matter.

Indeed, I had originally conceived, upon a much larger scale of reasoning, that freedom from arrest for libel was a privilege incident and necessary to a House of Commons; because it was a safe-guard against the power of the Crown, in a matter that was almost always a dispute between the minister and the subject, and no more than a natural security of person for an independent part of the legislature; of a deputy and ambassador from the people, against the arbitrary proceeding of a King's officer, in the least ascertained of all imputable offences. But this point has, I know, been lately cleared up to the contrary in St. Stephen's chapel, upon a debate of two successive days, the last of which continued from three in the afternoon till two in the morning*. Nevertheless, the Commons of England at large, having come to no new compact or surrender of antient privileges, still possess their old right of being judges of the law in libel.

I cannot help adding too, with regard to pledges for keeping the peace or good behaviour, that, in my apprehension, they are not demandable by law in the case of any libel, before conviction; for this species of misdemeanour is only made a breach of the peace at all by political construction, nothing being an actual breach of the peace, but an assault or battery, the doing or attempting to do some bodily hurt: And for that reason, articles of

* *Vide* the printed Votes of Wednesday the 23d of November 1763, and Thursday the 24th of November 1763.

the peace can only be demanded from a man, who by some positive fact has already broke the peace, and therefore is likely to do so again; or where any one will make positive oath, that he apprehends bodily hurt; or that he goes in danger of his life from him. Surety therefore for the peace, is calculated as a guard from personal injury. The articles which are every day exhibited in the court of King's Bench, are always for the prevention of bodily damage; the person who exhibits them against another, always swears that he goes in bodily fear of him, and generally, that his life, he verily believes, is in danger from him. No case is so common as that of women exhibiting articles of the peace against their husbands; now, I do not believe, that if any wife was to allege as a foundation for such articles, her husband's having wrote a libel against her, let the libel be ever so false, scandalous and malicious, that Lord Mansfield would make the husband find sureties for the peace, or for his future good behaviour on that account. Another reason which strongly weighs with me upon this matter is, that the writers upon bail, or the delivery of a man's person from prison, in misdemeanours and cases not capital upon his giving sureties for his appearance to try the charge against him, never mention sureties for the behaviour, in any case of a libel or constructive breach of the peace; and yet it would have been material for them so to have done, if such security could be demanded, and must be given before a man could obtain his liberty. My Lord Coke has wrote an express treatise upon bail and mainprize, and has considered the writs *de homine replegiando de odio & atia*, and of *Habeas Corpus*, and yet all that he lays down, would induce one to think that there can be no foundation for this new doctrine; and it is plain that he had no imagination of the thing himself. He says, "Bail and mainprize is, when a man is detained in prison for any offence for which he isailable or mainprizable by law, is by a complete Judge or Judges of that offence, upon sufficient sureties, bound for his appearance and yielding of his body, delivered out of prison. As for example, if a man be indicted of any felonies, publishing of any seditious books, &c. contrary to the form of an act made in the 23d year of Queen Elizabeth, he may be bailed, for the offence is made felony, and bail and mainprize not prohibited." And in the case of a public libel, there is nobody, I am sure, who can come into the court of King's Bench and exhibit articles of the peace against the

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writer or publisher, swearing that he believes himself to be in danger of bodily hurt from him, and that he walks in fear of his life from him. It is further observable, that there is no adjudged case where this demand of surety for the peace in libel, has been determined to be legal; the crown hath in some cases, after insisting upon it, avoided having the point determined, and relinquished the claim to it: it is contrary to the general principles and notions of law; and it may be the means of great oppression. Any gentleman would therefore serve his country greatly, by resisting such a lawless demand, and by having it solemnly argued and decided by the twelve Judges, upon the very first occasion.

In the mean time, when a man is charged with a libel, by an arbitrary information *ex officio*, he must (to sum up the whole upon this material point) cry out, like a Roman of old, *Provoco ad Populum*. I appeal to my country, that is to a Jury of my equals, the great and immemorial pre-eminence of Englishmen. I will give bail or sureties for my appearance to try the validity of this charge before them, but I will do nothing more. I never heard till very lately, that Attorney Generals, upon the caption of a man supposed only a libeller, could insist upon his giving securities for his good behaviour, before he should be admitted to bail and delivered from confinement. It is new and unprecedented doctrine, injurious to the freedom of every subject, derogatory from the old constitution, and a violent attack, if not an absolute breach, of the liberty of the press. It is not law, and I will not submit to it.

What makes me insist the more upon all these points is, an assurance that the legal methods of proceeding in every case of a libel, are sufficiently severe, and that therefore all illegality is totally inexcusable. The prosecution is heavy, and if the supposed offender be found guilty by the Jury, his punishment may be extremely grievous. After the trial, all the circumstances that appeared are reported, by the Judge who presided, to the King's Bench; and this Court gives judgment thereupon, after deliberation, and both can and will proportion the punishment to the case. They may *after* conviction, pillory, fine, imprison, and even insist upon sureties for the good behaviour, according to the nature and degree, the mischievousness and tendency of the libel. In bad times, Sir Samuel Bernardiston, for letters not very extraordinary, was fined 10,000 l. In good times, Shebbeare, for the most seditious and treasonable libel that could be penned, was fined in no very great sum on account of his circumstances, but was pilloried,

pilloried, committed to prison for two years, and obliged to find security for his behaviour, in a pretty tolerable sum himself and two sureties in as much more, for seven years to come. All this may be done at present in the regular way of proceeding, where common men are concerned, and seems to be as much power of punishment as can be wanted in such a State as ours, for a mere misdemeanor; because I presume nobody chuses to revert to the additional punishments inflicted before the Star-Chamber was suppressed, under that pious Monarch Charles the First, such as burning in the face, flitting the tongue and nostrils, cutting off the nose and ears, and long or perpetual imprisonment, which was the treatment of writers against Administrations in those days, and was, if I remember right, absolutely inflicted at one time upon the three liberal professions, in the persons of a Clergyman, a Counsellor and a Physician.

But, if the libel be upon the Legislature, and the Libeller a Member, the House will now expel him, as Queen Anne's Tories did Sir Richard Steele, for charging the Queen, and her Ministry with a design of breaking the establishment and introducing the Pretender; and yet I suppose now-a-days there is nobody who doubts in the least that Knight's having published the truth when he said so. Indeed, he admitted himself the Author of the paper complained of, so that the then commons were under no difficulty about the fact of Authorship, and not obliged to help that necessary fact out, as they could, by the reception of testimony not upon oath. Nay, the Courtiers of that day thought the punishment of expulsion alone so severe (although I do not believe Sir Richard's creditors were much more numerous than Mr. Wilkes's) that they stopped there, and carried on no prosecution against him in Westminster Hall, or *any where else*.

I do not touch again upon Mr. Wilkes in this place as commiserating him particularly, having ever avoided his acquaintance, but merely to say, what indeed the History of England from the beginning of the reign of Charles the First to the present time may illustrate, that prosecutions for libels generally arise from, and are pursued with a spirit of party-revenge. Men are upon such occasions apt to do things which in cooler moments they would be ashamed of. With respect to the last named Libeller, I must however declare, had I been his constant companion, much more the partaker of his loosest pleasures, and of his most shameless blasphemies, I should not have stood forth either in the one House or the other as the immedi-

ate mover of his public disgrace, censure, prosecution and ruin, unless I had an inclination to convince mankind that I was regardless of all principle whatever, excepting that of serving a party for my own private interest, and from that motive was willing to act upon any stage the most inconsistent and most abandoned of all parts, even against the companions of my happiest hours, and to imprint this lesson upon the world, that no motive whatever of public good was at the bottom of my conduct, or even the smaller restraint of common decorum. In my own opinion, this ludicrous Libeller did himself all that his severest enemies could wish, to turn his own case into ridicule, and to let the people see that a love of farce and merriment predominated in all his actions; and that he had too much levity and profligacy of natural constitution to make the good of his country the rule of his conduct in any one action of his life. But the sight of these very things should make grave men of all sides attend to the Constitution in such contests of profligacy, so as to prevent the laws of their country from being made either the sport or the sacrifice of party upon the occasion. A point that is carried very improperly for the sake of punishing a worthless fellow, may be cited hereafter as a precedent for the most dangerous and unconstitutional prosecution and oppression of an excellent patriot. Party has no bowels, nor any regard to the rules of justice, further than self preservation and fear make them necessary. It will denominate any writing seditious and treasonable, that is contrary to its interest; and use all the weight of the prerogative in wreaking its vengeance upon the writer.

An humble and just petition, the most respectful and constitutional of remonstrances from seven Bishops, in behalf of the established religion, has been treated in this manner, and nothing but the honesty of a Jury saved them from the most unjust condemnation. Mr. Somers's *modest plea for the Church of England*, underwent the same denomination, although it was no more than a seasonable defence of our national worship, upon the true principles of the Constitution, against an arbitrary and Popish Court.

And I remember myself a tiny pamphlet, published by the Author of *The Considerations on the German war*, questioning the merits of the defence of Minorca, by argument, not by hard words or foul names, which was unfortunately on motion in the *King's Bench* deemed a libel, and an information in the ordinary way granted against the writer, whereby he became a considerable sufferer; and yet

I believe

I believe any man who were to read this performance now, free from prejudice, would never concur in that opinion.

In short, one cannot guess what may, or may not, in some unlucky time, be regarded as a libel by some Judge or some Attorney General, and so be ruled or informed against. The highest or lowest of Authors, the noblest or the most sneaking, the Original or the Copy, the Patriot or the Tool, the Head of a Party or the Amanuensis of a private Junto: in short, the most respectable Commonwealthsman or the paltriest of Coffee-house Listeners and Political Eavesdroppers, may equally chance to fall under this arbitrary brand.

Nay, if two foreigners should happen to have a dispute relative to their respective characters or appointments, and a difference should arise about the œconomy or charges of one side and the other, and either should publish, by way of justification of his pretensions, a parcel of letters that really passed, this might, for aught I know, be held to be a libel, for which the Attorney-General might file an information, and to which no defence, by the help of a little management, should be deemed possible, and which therefore counsel might fairly give up without the loss of their character.

If a man was now to publish an ode, like that of Mr. Pulteney to Lord Lovel,

“ Let’s out for England’s glory,”

inviting any courtier to join in measures of opposition to the administration, and it was to be written with half the spirit and beauty, it might for aught I know, be capable of an information *ex officio* as a libel, altho’ no man turned of thirty, I suppose, would think any placeman could be moved thereby to oppose the court, and quit any part of his finery, for the sake of being called a patriot, or for any pleasure he could have from holding seditious discourses.

Nay, if it be law, that a man may be guilty of a libel by writing against the dead (as well as the living) I do not see how the world is ever to be at liberty to discuss the actions of administration, or any man be able to publish what he may think useful animadversions upon their conduct in particular instances. For example, if I was to say of a late Great Chancellor, that altho’ I had a high reverence for him altogether, yet that I could not think he merited the appellation of a true patriot, having ever regarded him rather as a decent, circumspect, prerogative lawyer, than as one who acted upon true principles of liberty, according to my apprehension of them; that he

leaned in his notions too much towards aristocracy ; that he seemed to me, in his politics, to approach much nearer to the principles of the Earl of Clarendon than of Lord Somers, and indeed in every other respect, even in his accomplishments and literature ; and that, at last upon what *public* principles he joined the opposition, after having been in all things with the court for forty years before, I could never learn. It seemed to me, that even his opposition to, or rather disapprobation of, the peace, proceeded rather from a private dissatisfaction at the man who happened at last to have the making of it, (his old friends being displaced) than from any motive of public concern, and that some of his reasons against it, were those that most indifferent men would have thought the strongest in its behalf, namely, the wording and marks, or description, of the boundaries in North-America, which the course of a great river is made use of to do, and must for ever most notoriously effect, as long as the world lasts, in my opinion. Indeed, I could never determine with myself whether he had, or had not, a good conception of our foreign interest, altho' I always imagined he had a thorough one of all the domestic connections among us. I might add, that I remembered it was always said he opposed, curtailed and embarrassed the militia act in its formation, progress and execution, as much as he could, and yet, that this was intended as a constitutional force, or counterpoise, against a standing army ; that he was apparently a principal man in, if not the sole cause of, defeating a new Habeas Corpus bill, calculated for the prevention of some evasions which had been practised to elude the regulations of the old act, and, that he projected, in concert with another new-made Peer, the Marriage act, and, having disapproved a short bill, drawn by the Judges, which merely annulled Fleet-marriages, &c. as being fraught with all sorts of inconveniences, from not being regularly registered and capable of proof, had the reputation of drawing another, filled with clauses calculated for the prevention of all marriages without consent, with a view, as it should seem, to perpetuate, as much as might be, a fortune or family once made, by continuing, from generation to generation, a vast power of property, and to facilitate the lumping of one great sum, or one great family, to another, by bargain and sale, in opposition to the generous principles of equality and diffusive property, which free states have always encouraged. Now, This, which a man might write from his heart, might, for aught I know,

I know, be prosecuted as a libel on the dead; whereas the writer wrote no part of it maliciously, nor falsely as he believed, and did not mention a tenth part of what he might, in support of the justness of the character. Nay, altho' he should say, at the same time, that he was persuaded the same illustrious personage was blessed with a natural good temper, and great worldly prudence, which are the two hand-maids in ordinary to prosperity, and; that he possessed, in general, the soundest understanding in matters of law and equity, and the best talents for judicature he had ever seen; that he might, perhaps, be cited as the only example, in this country, of the perfect picture and character of a good Judge, which my Lord Bacon hath so admirably drawn; and that he was in short a consummate lawyer, and a truly wise magistrate; and that this was the great shining page of his life, and what would alone distinguish him in history from the multitude who went before him in the same important offices of Chief Justice of England, and Chancellor of Great Britain.

In truth, a man is justified from what has really happened, in making any suppositions upon this head, where there is such an open field for political discretion to range in; and therefore, unless a matter be thoroughly canvassed, and gentlemen at the bar will speak out to a Jury, that they may have the proper information to deliberate upon, it is hard to say what may not very glibly pass at one time or other for a libel. Every thing seems to me to depend upon the Jury's considering and determining both the law and fact, as things are now constituted. I trust, therefore, the singular privilege of judging upon the whole, whether any publication be, or be not, a libel, will be for ever retained, and exercised also, by the people themselves. If they once give it up, they will never know any thing of public transactions, but from the most partial and least credited of all mankind, from writers employed by the authors of the measures themselves, who may, like Scotch critical reviewers, have the face to attempt to make Englishmen believe, that a man can be a constitutional judge who quits the laws of the land and deviates from the established practice of courts, in spite of common sense and of the constant declaration of our ancestors *no-lumus leges Angliæ mutari*. Let the dependent judges before the Revolution have advanced what doctrine they please, the *fact* has been that juries have always exercised their right of determining the law about libels. It hath saved this constitution often, is the great bulwark of liber-

ty, and should never be resigned but with the last breath. The consequence thereof to the liberties of this commonwealth is more than most people are aware of.

Few men know much of the nature of polity, and, of them, all do not sufficiently attend to the conduct of administration, to observe when slight innovations are made in the laws or in their administration and exposition; and, of those who do, very few indeed have that degree of understanding which enables them to judge soundly of the consequences of such alterations with respect to their liberties in general. Again; of these very few, not more than one perhaps has activity, resolution and public Spirit enough to draw up, and publish his thoughts (as Mr. Somers did upon several occasions) concerning what is going forward, in order to alarm (like a good citizen) the rest of his fellow subjects. Insomuch that breaches in the constitution, which by degrees bring on a total loss of liberty, are either wholly unnoticed, or else are regarded and talked of as the mere heat and violences of party, by which nobody, it is pretended, can be affected but the immediate actors. Whereas, for the sake of compassing their own ends, and gratifying their own resentment, without any worse principle at the bottom; there is nothing which party men will not do, and therefore those who happen to get the uppermost hand will, if you let them, very chearfully crush the others by any means whatever, *per fas out nefas*; just as an established high churchman will persecute even to death, any other man or divine that questions his authority or his doctrine. From hence arise the precedents of all illegal, unconstitutional practices. Ministers too at all times as not one in a thousand is actuated by any principle of public good or even by a desire of honest fame, for the sake of power, title, riches and pre-eminence of any kind, will do any thing. They will deceive the best inclined prince, and will minister to the humour, folly, vices and domination of the worst. High Churchmen do the same, if one may judge from the conduct of the Bishops on the Exclusion-bill, when no more than two of them, if I remember right, would venture to vote for the bill (not even enow to make a plural number in Greek, as somebody observed,) altho' their bishopricks depended upon the continuance of the Protestant Religion, which that Bill was avowedly and manifestly framed to preserve. Now, when an impartial man gathers this, both from his own experience and from history, how can he help being moved at the doctrine that is publicly held

held with respect to libels, that is, with respect to writings that animadvert upon public proceedings, and the use that is made of that desperate sword an information, together with the means that are every day devised to make it more dreadful and fatal.

I will venture to prophesy, that if the reigning notions concerning libels be pushed a little farther, no man will dare to open his mouth, much less to use his pen, against the worst administration that can take place. If a simple, *true* relation of facts may be a libel on government; surely any animadversion upon them which by a course of just reasoning may tend to prove their destructiveness to the kingdom, or to the liberty and property of every living man in it, must be the grossest of libels, however much it behoves the people to be apprized of the condition they are likely to be in. In short I do not see what can be the issue of such law, but an universal acquiescence to any measures, that is, a downright passive obedience.

There is one great reason, why every patriot should wish this sort of writings to be encouraged, which is that Animadversions upon the conduct of ministers, submitted to the eye of the public in print, must in the nature of the thing be a great check upon their bad actions, and render them cautious, but at the same time be an incentive to the doing of what will bear examination and is truly praiseworthy. Nevertheless, if it be once clear law, That a paper may be a libel, whether true or false, written against a good or bad man, when alive or dead, who is there that may not continue a minister, whether he has a grain of honesty or understanding, if he should happen to be a favourite at Court? One must neither reflect upon his public proceedings in his life-time, nor after his death; the words will be seditious if true, poignant and full of salt, and the author of it a libeller. No bad Minister therefore can be written against at all. The worse his actions are, the more truly and sharp the writer states them, and the more the Public from his just reasonings detest and cry out against them; the more scandalous, and seditious of course, will be the libel; for *the truth of the fact is an aggravation* of the libel, and it was That which occasioned the clamour. In God's name, what must mankind be to endure with patience such shackling doctrine, so inconsistent with the existence of freedom, or even the idea of a Commonwealth! There is but one step farther, before you arrive at compleat despotism, and that is to extend the same doctrine to words spoken; and This I am persuaded would

in truth very soon follow. And then what a blessed condition should we all be in! Could we call ourselves any longer free men; when neither the liberty of free-writing or free-speech, about every body's concern, about the management of public money, public law and public affairs, was permitted; but a padlock was put both upon the mouth and the press as to these matters, and every body was afraid to utter what every body however could not help thinking?

With respect to libels on particular persons in their private capacities, there may be some little foundation for a doctrine of this sort; because, as the welfare of the State has nothing to do with his private transactions, you ought not to tell stories of or make reflections upon him, which may injure him in his calling or his reputation; you must always do this out of personal spight, without any public good in view, and therefore ought to be punished for such your malevolence.

But, the case is totally different with respect to an administration; for the country in general is always the better or the worse for its conduct, and therefore every man has a right to know, to consider and to reflect upon it. Their posts in the state, or their public characters, are not like any individual's particular trade, profession or fortune, or his private character. The writing of them out of their places in the government is not a loss for which they have any right to be repaired in damages. Their holding ought only to be *quam diu bene se gesserint*, and of this the people at large ought to be made judges, as every man in this country is represented, and consequently concerned in the legislature itself.

However, from a confusion of these two different kinds of libels, introduced and upheld from very bad motives, it seems to me that a general doctrine has been laid down with respect to libels. Now, my notion is, that in public libels the truth of the charge should be an absolute defence, whatever may be thought necessary with regard to private libels. The public is essentially interested in this discrimination being made. Who could or would otherwise write against the measures of any ministry, however pernicious they might be to the welfare of the community?

When men find themselves aggrieved, by the violence or the misconduct of the persons appointed to the ministry and to places of profit, trust and power, it is natural for them to complain, to communicate their thoughts to others, to put their neighbours on their guard, and to remonstrate

monstrate in print against the public proceedings. They have a right so to do, as much as a borough has a right to reject any court candidate, and to publish the reasons for so doing; and both of these rights will, I hope, be exercised until there can be both a *congé de dire* and *d'ecrire*, and a *congé d'elire*, established in the State as there already is in the church. The liberty of exposing and opposing a bad administration by the pen is among the necessary privileges of a free people, and is perhaps the greatest benefit that can be derived from the liberty of the press. But ministers, who by their misdeeds provoke the people to cry out and complain, are very apt to make that very complaint the foundation of a new oppression, by prosecuting the same as a libel on the state. Now, the merit or demerit of these publications must arise from their being true or false; if they are true they are highly commendable; if they are wilfully false they are certainly malicious, seditious and damnable. The mere pretence of a paper being seditious, if the matter of it be fact, is to be disregarded; for, I do not see how any writer can publish to the world the justest and most important complaints, without tending thereby to render the people and their constituents dissatisfied with the administration, and even clamorous against it. Nay I scarcely can frame to myself any other way of letting his Majesty know that the ministry he has appointed is bad. However, if a minister notwithstanding should continue a favourite at court, and the people being affected with what was written should clamor, and have great reason for so doing, I make no doubt but any Attorney General upon the slightest hint from the proper place would file an information against the Writer, and charge him at once with endeavouring to alienate the affections of the people, and to raise *traitorous* insurrections against the peace of the King; altho' it were obvious to every indifferent person, that the unlucky writer had no such intention, nay, had been ready on a former occasion voluntarily to associate for the defence of his Majesty's title, and to venture his life in the field to support it. In short, I do not see how any thing could be written against a public minister, without being liable to the imputation of libelling; and yet I am fully convinced, that were it not for such writings as have been prosecuted by Attorney Generals for libels, we should never have had a Revolution, nor his present Majesty a regal Crown; nor should we now enjoy a protestant religion, or one jot of civil liberty. Kings can hardly receive any intelligence but
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what their ministers give them, and these gentlemen, being generally guided by avarice and ambition, endeavour to represent every man who strives to get them dismissed from their employs, as one who is about to attack the throne itself, call him traitor directly, and then exert the whole power of the Crown to demolish him. The use of the word *treasonable* is generally, in my conscience, to give them a pretence for disregarding the common rules of Law and Justice. And if they are questioned in parliament for what they have done, they are in hopes a majority may be procured to come to a resolution in their favor, or at worst, to prevent any from being come to against them. And then, who dares say they have done amiss?

I agree with the attorney that libels are by no means a "harmless sport"; for, truth alone can excuse any man in complaining even of a bad magistrate: but yet, I cannot think them such dreadful things as vindicate ministers in breaking through every law for the sake of coming at the writer. I believe most sober men, who see already what lengths such prosecutions may be carried according to law, and how deeply the liberties of the people may be affected by such means only, are of opinion, that if some of the legal methods of prosecution now acquiesced in were done away, the constitution would be the better for it. The prerogative which an Attorney General assumes of filing an information against whomsoever he pleases, is certainly a reproach to a free people; and if the regular information awarded upon special motion by the *King's Bench* were likewise taken away, I do not think the constitution would be injured by it: in which case, the old common law method of indicting for a libel, as a violation of the peace, would be the means that every body must resort to; and in my own opinion a grand jury are very competent and the properest judges whether any publication be destructive to the welfare of the state or not.

Every man is certainly free to write, there being as yet no licensing act afoot; and, if he deals in improper Matter, "it is at his peril." If a man prints what is supposed libellous either on the state, or any particular person, he is liable to be prosecuted for it. But people like to see a prosecution for this offence go forward in the ordinary way, according to the forms and rules of justice; as was the case with Dr. Shebbeare: in comparison with whose writings, by the bye, those of Mr. Wilkes may really be said to be "a mere exercise of wit and talents, and an innocent exertion."

tion of the liberty of the press." Mankind will ever dislike violent proceedings; for, altho' the person himself may merit the chastisement he meets with, yet if this be inflicted by illegal methods, it will make every man fear, should he raise the resentment of the ministry, that himself would be treated in like manner, whether he had committed any crime in law or not. If things are done in one instance contrary to law, they may in another. No man is secure, when the laws of the land cease to be a protection. Although the messenger, or the dragoon, be not at my door, yet it is very disheartening to find that it is no longer in my power to be secure against their being there. My liberty is equally gone.

No Necessities of state can ever be a reason for quitting the road of law in the pursuit of a libeller. The attack of this class of writers seldom goes farther than the minister, and is almost always an attempt to discredit his administration for the sake of bringing in some other man; and so far therefore from being "of all other the instance the most dangerous to the public quiet" is certainly not at all so, if by the public quiet be meant the government and establishment itself. A fearful minister, however, will at all times be ready to construe any animadversion upon his conduct a traitorous attempt to shake the throne itself, when every body else is convinced of the contrary, and knows the animadverter to be as affectionate to the person of the prince as any man in his dominions.

But, if any writing should be a libel, and be prosecuted only as such, it is in vain afterwards to call it "abominable or treasonable," with any idea that such epithets will warrant an extraordinary, illegal proceeding in the prosecutor. This end indeed it may answer, and a very diabolical one it is; that it may serve to found a pretence for demanding excessive bail for the appearance, which if the supposed libeller cannot find, he must lie in prison: however, as there have several acts of parliament passed from time to time forbidding excessive bail, particularly the Habeas Corpus act, and as the House of Commons have even since in the case of Lord Chief Justice Scroggs expressed their detestation of such oppression, a Judge is not now so likely to put this mode of tyranny in use. But, if the doctrine of security for the peace in a Libel can be established, I do not see what should hinder a time-serving magistrate, at the instance of a violent Attorney General, from insisting upon ever so enormous a pledge *eo nomine*, and not as bail for appearance. The Judge who was
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to do this might say, I have taken moderate bail ; but I, thought it necessary to insist upon prodigious security for his future good behaviour, because I found he was a man of parts, much disinclined to his Majesty's measures of government and administration, and had all the reason in the world to think he would go on to write against them, which could not fail of raising a dangerous sedition, and therefore I thought the best way of preventing this public mischief, was to take such a pledge for his good behaviour for seven years, as would deter him from writing any thing that could possibly be deemed a libel ; for if he did, he would forfeit his surety or caution-money, and That would be so great a loss, that it would absolutely ruin him. I did for the best ; and, I do not know that there is any statute which takes notice of or prescribes any measure for security of the peace. Now, supposing a Chief Justice was to be complained of for such an oppression, as a gross fraud contrived on purpose to counteract the spirit and intention of the Habeas Corpus act, and the House of Commons were to inquire into the matter ; if the administration which he served was then prevalent, it might perhaps be very difficult to obtain any censure of the practice ; but, if that could be done, it is highly improbable they would go any farther ; and, at the worst, his Lordship would get off without any fine upon himself, as well as Chief Justice Scroggs did. To say the truth, and to speak out upon so material a subject, I cannot help imagining that this word *treasonable* or *traitorous* is frequently thrown into the charge against a supposed libeller by an Attorney General, for the purpose of affording colour for the demand of high bail, and, if possible, enormous security for the good behaviour.

Had this practice of surety for the peace upon the charge of a libel prevailed in Charles the II^d's time, it is inconceivable that the legislature should not have mentioned it by name in the Habeas Corpus act. The patriots who procured that statute evidently meant to have a delivery of the body in all cases not capital by bail, and must certainly think by the words *speedy relief of all persons imprisoned for criminal or supposed criminal matters*, that they had provided for all cases of misdemeanor, and that the persons of all libellers especially, would be replevied under the act.

It is no excuse for this novel attempt to say, that Judges take the same sureties for appearance and for the peace, and make the one the measure of the other ; because they are certainly not obliged so to do, and might perhaps on some occasion

occasion see reason to do otherwise, and, besides that, a man might forfeit his pledges for the behaviour by some subsequent imprudence, altho' he might be acquitted of the charge which had occasioned them, and this could never be the intention of any legislature. However, now that the thing has been attempted, it may possibly require the attention of parliament to remedy and directly prohibit it for the future. Whether the warrant of Lord H. was only for a seditious, or for a seditious and treasonable libel, makes no difference. The fact indeed is, that the * warrant, which was for apprehending persons and papers, does not mention the word libel at all, but uses the terms, *a seditious and treasonable paper*; and the second ** warrant, which was for

* *Georgè Montagu Dunk Earl of Halifax, Viscount Sunbury and Baron Halifax, one of the Lords of his Majesty's most honourable Privy Council, Lieutenant-General of his Majesty's forces, and principal Secretary of State.*

These are in his Majesty's Name to authorize and require you (taking a constable to your assistance) to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper intituled the North Briton Numb. 45. Saturday April 22, 1763, printed for G. Kearsly in Ludgate-street, London, and them, or any of them, having found, to apprehend or seize together with their papers, and to bring in safe custody before me, to be examined concerning the premisses and further dealt with according to law. And in the due execution thereof, all Mayors, Sheriffs, Justices of the Peace, Constables and all other his Majesty's Officers civil and *military*, and loving subjects whom it may concern, are to be aiding and assisting to you, as there shall be occasion and for so doing this shall be your warrant. Given at St. James's the 26th Day of April, in the 3d year of his Majesty's reign.

Dunk Halifax.

To Nathan Carrington, John Money,
James Watson and Robert Blackmore.

** *Charles Earl of Egremont and George Dunk Earl of Halifax, Lords of his Majesty's most Honourable Privy Council and principal Secretaries of State.*

These are in his Majesty's name to authorize and require you to receive into your custody the body of John Wilkes, Esq; herewith sent you for being the author and publisher of a most infamous and seditious libel, intituled, the North Briton, Number 45; tending to inflame the minds and alienate the affections of the people from his Majesty, and to excite them to traitorous insurrections against the government; And to keep him safe and close until he shall be delivered by due course of law, for so doing

for committing Mr. Wilkes to the Tower, makes use of the terms, *a most infamous and seditious libel*. So that there is a diversity of denomination and description observed by the drawer of the warrant, whether the same were the secretary of state, his law clerk, or the solicitor to the treasury. Then comes the Attorney General, who files his information *ex officio* against the writer, and *charges* him with writing a libel. Now, *he* certainly knows what he is about, whether the others did or not; and therefore there is no longer any room for dispute about the crime, it is ascertained. Indeed, the King's message * to the House, delivered by the *Chancellor of the Exchequer* touching the same paper, calls it no more than a most seditious and dangerous libel, and the Resolution of the Commons thereupon execrates it but as a false, scandalous and seditious libel.

But a decisive argument upon this head is, that had the charge been other than a misdemeanor, it could not have been prosecuted in this way; for, no *information* will lie for a capital crime, or for misprision of treason. The statute says, they shall not lie for life or limb.

It is childish therefore to ask whether the printing of any particular libel, as for instance, of the North Briton No. 45, "is to be considered as no higher an offence than publishing a libel?" Certainly it is not, when the Attorney General informs against it, *ex officio*, and thereby charges it as no more. The Attorney says, "had it been adjudged to have excited, instead of tending to excite, it would have been no less a crime against the state, than that of high treason, without any palliation whatever:" to which I can only say in a plain way, that had it been adjudged to have been something else than a libel, it would not have been adjudged what it was; for, I do not know that any law-logic ever proved *libel* and *high treason* to be convertible terms. No two offences can be more distinct in their nature or kind. One is *by construction*, a breach of the peace, and the other is the highest of all capital crimes.

To compass or to imagine (that is to excite to, or intend) the

ing this shall be your warrant, Given at St. James's the 30th day of April, 1763, in the 3d year of his Majesty's reign.

Egremont.

Dunk Halifax.

To the Right Honourable Lord John Berkeley of Stratton, Constable of his Majesty's Tower of London, or to the Lieutenant of the said Tower or his Deputy.

* Vide the printed Votes of Tuesday Nov. 15, 1763.

the death of the King, is High Treason, and is punished with loss of life by hanging, drawing and quartering, whether the King be killed or even hurt, or not. But this doctrine holds in no other crime whatever. For, in petty Treason, which is the next greatest crime that the law knows, and which is the murder of a husband by the wife, or of the master by the servant, the inciting of others to perpetrate the act, or any attempt to do it one's self, without effecting the same, is only punishable as a misdemeanour and as an assault. The law has regarded the crime of high treason, for wise reasons, in a very different light from all other crimes, as the legislature has therefore been very strict in the definition, and in the proof prescribed by Statute, in every Stage of it. Let us not then be so impudently imposed upon as to be told, that every step we take almost in questioning the acts of a minister, is high treason. Every London or Westminster mob, every riot, every abuse of administration or of a party; every remark or animadversion upon a proclamation, or upon a speech from the throne, or in short, upon any other public measure of the ministry will in this way of reasoning soon be deemed Treason, to the disgrace of ourselves, the dishonour of our constitution, and the loss of the rights of a free people.

In truth, I likewise suppose the Attorney General knows his business too well to denominate any offence a libel, and to prosecute it by information only, if he means to have it considered as high treason. In a word, had No. 45 been any other thing than it was, it would not have been what it was.

Indeed, I have heard in discourse, that a certain laborious minister has whispered many of his friends, whatever they might hear from others, that the law-officers of the crown had assured him, Mr. Wilkes might have been prosecuted for High treason; but however, they were not willing to push things against him to the utmost. An assertion that is scarcely to be paralleled (I believe) for its folly, profligacy or impudence; and which, in a country where nothing can be done but by law, deserves no other answer than this, "I wish you had attempted it; for, if you had, it would have ruined you, and you would have deserved it, as the only adequate reward for your pains." The Epping forest case would not warrant this position, I can assure him; and I am certain he has a private friend, a candid lawyer, who would strongly dissuade him from really making so ridiculous an attempt. I say this, because I suppose the minister himself, is now become so Right honourable,

honourable, that he ceases any longer to be learned in the laws of his country.

But, why is the Attorney angry with any other man for calling this celebrated piece a libel, when he himself with all his elaborate perplexity of language can call it no more? Why need he be at the pains of searching for words to denominate "seditious writings, a subtle poison, the seed of jealousy, revolt and discord, the parent at least, if not the offspring, of treason?" (Or why not both parent and offspring at one and the same time: the sense will not be hurt, and the creed more orthodox?) It can only be to shew either the copiousness and perfection of his language; or else that in every light he can put these writings, they will appear the same, their nature will not alter, they will still be but libels. It cannot be to tell the world what everybody is already convinced of, that there is a great deal of difference between libel and libel in their features, as between other individuals of one and the same species, some having more and others less wit, some being more and others less personal, some levelled against the establishment, and others against that varying thing a ministry. For example, *The Sixth Letter to the people of England* was a most gross attack upon the present constitution and succession; but *The Test*, *the Letter versified*, and *Rodondo*, were merely personal abuse upon Mr. Pitt, his Lady, and her eldest Brother. *Mock Patriotism* took a middle flight between the abuse of one or two individuals, and that of a whole party; altho' for the beauty of its images, the happiness of its allusions, and the elegance of its expressions, it was *rara avis* in this predicament of writers: none of whom however were without some wit and merit; excepting always, nevertheless, the dull and rancorous Jacobite first named. In truth, abusive satire has been dealt in pretty equally of all sides, and the only measure has been the abilities of the respective penmen. The people on the stage will always afford more handle than those who are off, and therefore a minister must supply more matter than a private man. But, how the law and the constitution can be endangered thereby, I do not conceive, unless every man in power is determined to break through both, in order to make his own cause that of the publick. The behaviour of old Johnson seems to me to be much more proper and honest upon such an occasion, who, when somebody shewed him a North Briton turning his own definition of a pensioner upon himself, very cleverly answered, "It is fair enough, I have no reason to complain,

" *Nec lex justior ulla*

" *Quam necis artifices arte perire sua.*"

Alte

After all, the Attorney himself cannot help being ludicrous upon the occasion, and cannot forbear speaking of the composition of libels as "an exercise of wit," and thereupon "supposing the author of *The Budget* may chuse "by and bye to amuse himself this very way;" and then roundly proceeds to charge this gentleman "with personal indecency of his" supposed "friend with acrimony, envy, spleen, conceitedness and self-importance" as mere flowers, I presume, of rhetorick well becoming the pen of a ministerial writer against libels. In short, he speaks of the ruin of a virtuous patriot by an information, with as much appetite and glee, as an old lecher does of the debauching of a comely virgin by ravishment. But, the undertaking of this writer is ridiculous; it being impossible for any attorney to make brick without straw, "let him be glad to know what he will." He is equally awkward in his attempts both to bully and to be humorous, either as a porter or as a scribe; the world will not be faced out of their senses: and will therefore always regard him as a mere *bog in armour*.

Nobody without doors, that is not of a party, thinks the case of any "libel justifies strongly," or at all, "the practice of general warrants," if it were only for this reason, that every party against whom a libel is levelled, always christens it seditious, treasonable and what not; and yet, whether it be any libel at all, no man has any right to pronounce, before a jury of the country has determined it to be one.

With respect to the warrant itself of Lord H. the Attorney cannot work himself up to the affirming as a lawyer, that it is legal; no more than he could just now to the asserting that an indictment or information for a libel, by the adjective treasonable, became any thing more than a libel. If the form of the warrant had really been according to the, "uninterrupted practice of the Secretary of State's Office," This would not have made it a legal form. But even this is not a fact, for one cannot help remarking that the old Tories under Queen Ann, the Revolution still tingling in their ears, were exceedingly cautious in this regard, consulting council, probably upon the warrant itself, before they ventured to take up any subject thereby; insomuch, that all the warrants even of Lord Bolingbroke, whilst he was Secretary of State, and which now remain, appear to be strictly legal. In truth, there has been no uniform practice at all in the office, as may be seen by the variant and multiform warrants printed
C from

from thence in *Quarto*, and privately distributed to trusty friends by P. C. W. with the inscription of *most secret*. Much less would precedents only from the time of the Revolution be sufficient to *justify* such an illegal practice. And as to the pretence that this practice "did not then" take its rise, having been frequent in former reigns, "reaching back *perhaps* to the remotest times and combined with the very essence of government," it is totally groundless; for, after the most diligent search, no warrants of a similar form could be found higher than the reign of the Stuarts, but few of them, and of those few hardly more than one of an antienter date than Bennet Lord Arlington, Secretary to Charles the 2d. From such premises, however, this hardened writer would insinuate, that *perhaps* they were used in the remotest times, and are of the essence of government. A fair, honest argument, truly, to a free people, upon a capital point of liberty! *Quate Os!* This notable antiquity of office is indeed further supported by a note which takes notice that the act of Henry the 8th, settling precedency 200 years ago, mentions, among other officers, the King's Secretary. It does so. And what of that? This was the æra of the reformation of Religion; but, I never heard before it was the commencement of civil government. No prior mention however, of King's Secretaries, as officers of State, could I suppose be found, and, therefore, this or none must be cited. Is this now, in the name of common sense, a proof of immemorial existence? The fact is, in antient times, the King had only a private Secretary; there was no such person as a Secretary of State. He is the production of times within memory (to speak as a lawyer); and none of the many books which treat of the great officers of State, and the *Aula Regis*, make any mention of such a Being. His consequence and power arose from his being admitted a Member of the Privy Council. So that the two grounds suggested as an authority for the issuing of these General Warrants, namely, the constant exercise and usage of them, and the antiquity of the office of Secretary of State, both fail. But, had they both been good, they would not have authorized these warrants; because a practice of the like sort, must be supported by uniform usage; and, the warrants produced, differed so much in their form, that hardly any three of them were exactly alike. The greatest part too of the warrants offered in proof of this custom and pretended right, were issued in the times of rebellion; when men are not likely to call in question such a proceed-

proceeding, the extremity of the case making them wink at all irregularities, for the sake of supporting the protestant establishment itself. And yet, bad men, as one may easily figure to one's self, will be apt to lay stress upon such acts of necessity, as precedents for their doing the like in ordinary cases, and to gratify personal pique, and therefore such excesses of power, are dangerous in example, and should never be excused, but when it appears that government could not be defended or upheld without actual recourse to them. But, even if the usage had been both immemorial and uniform, and ten thousand similar warrants could have been produced, it would not have been sufficient; because, the practice must likewise be agreeable to the principles of law, in order to be good, whereas, this is a practice inconsistent with, and in direct opposition to the first and clearest principles of law. Immemorial uniform usage will not even support the bye-law of a corporation, if it be flatly repugnant to the fundamentals of the common law; much less, will it warrant and authorise the secret and multiform practice of an unconstitutional, political office. In one word; no warrant whatever, in any case or crime whatever, that names or describes nobody in certain, is good, or can be justified, in law, in any circumstances whatever. A general warrant is bad in treason, felony, or any other case that can be imagined. Therefore, if that point alone had been put in question, I do not see how any "thinking and honest man could " have fairly voted against it;" because, I do not well understand how a conscientious man can vote against what he knows to be the truth and the law of the land: and here I challenge the Attorney to affirm, in so many words, that any General Warrant is legal or justifiable in law, in any case whatsoever. He dare not do it; although he has attempted to insinuate so much to his reader. The law is too well established to be rendered doubtful in this respect, by all the dexterity of the Attorney or his Coadjutor. It is not yet rendered uncertain and ductile enough. Eight years more of ingenious and covert application to this sort of work, will scarcely accomplish, I believe, so arduous a task.

The Attorney might as well say, that Lord H. when using the power of a Justice of the Peace by virtue of his office of Secretary of State, could make an illegal Warrant, as a Magistrate, good as a military officer, by styling himself *Lieutenant General of his Majesty's forces*, and commanding all *military officers to assist as there shall be occasion.*

ason. This circumstance too, is so new, that it has now made its appearance for the first time, I believe; and, therefore, as a stranger should be treated with civility and respect, and no complaint made of its unconstitutional introduction. I am seriously of opinion, that this is as good an argument, in law, as what can be derived from the usage of a Secretary of State's Office.

Moreover, it is not true, even in a political sense, that a declaration of the illegality of all General Warrants whatever would "take away from the executive power, "an authority which may frequently be found essential "to the very being of the State." For, whenever High Treason itself (the only crime that need ever occasion such a stretch of authority, and even That very rarely) should make a minister venture to transgress the law in this point; as That is a crime which tends to the dissolution of the whole frame of government, there is no doubt but the minister would be excused, by his fellow subjects of the same government, for the dictatorial power he should exercise for their benefit, upon such an emergency. For my own part, therefore, I see no reason why a man should not vote for the condemnation of General Warrants in all cases, without limiting his damnation to General Warrants in the case of seditious libels. "The propositions are different," but in the eye of the law, these general warrants are in both cases equally illegal. In short, if this was not the constitution, I think, "we might amuse the public with the sound of "liberty," but should really enjoy none. If such warrants were to be allowed legal or justifiable in any instances, it would be exceedingly difficult, nay, impossible, to restrain the ministers from grievously oppressing any man they did not like, under many pretences from time to time, for their own safety, without any true motive of public good. I agree, therefore, with the Attorney, in saying, that "if the liberty of the subject be the great "object in view, and be incompatible with General Warrants in one instance, it is inconsistent with the same "warrants in any other. There is no exception to be "made to our *general* reasoning." The Grievance too extends to all persons, of all degrees, of all qualities; therefore it is *commune periculum*.

As to the suggestion, that experience has proved "there "is only a possibility of danger to the liberty of the subject from the exercise of this power;" it is a most slippery argument, and of no real weight whatever.

For,

For, in the first place, these warrants have been rarely exercised until of late years, and perhaps never before, in the case of a libel, upon one of the representatives of the people.

Queen Ann's Tories would not have been so hardy, as to have violently arrested any Member of Parliament without the best and most positive information, nor without consulting one council at least, upon the warrants of apprehension and of commitment.

Every thing of this sort is practised with some tenderness at first. Tyranny grows by degrees. Besides, few common men have private purses sufficient to contend with That of the publick and the power of the Crown, both of which are used by every minister, to the utmost extent, upon such occasions. Sometimes too, the private prosecutor is bought off. An instance of which, I have heard of, when the D. of Newcastle was minister: the Attorney's friend, I dare say, can tell him the particulars at large. However, as all the parties are now living, the truth may be easily ascertained. As well as I recollect, under a General sweeping Warrant, the messengers seized some copper-plates of the late Rebels' victories, whereupon, the owner commenced an action; shortly after which Mr. P. his attorney, was called upon by a certain noted solicitor, who told him, that the Government would not return the plates, but would, however, make satisfaction for them. Mr. P. said, that he would not dissuade his client from making up the matter, but, that as the seizure was wholly unwarrantable, he must be handsomely repaired in damages, and therefore, he would not advise him to take less than 200*l.* upon such an occasion. The noted Solicitor agreed to, and paid the sum demanded, upon having a release of the action; altho', it was very clear, the real injury did not amount to 50*l.* Thus dropped and expired this action, as has been the case with many others before and since. In short, one way or other, the proceedings in these matters never came before the Public. The Parties are either too indigent to contend with the Crown, or else the Crown buys them off. The suits are all by some means smothered. For which reason, it is extremely difficult to cite adjudged cases, in such very clear points: and, therefore, one must decide upon them by general maxims and principles of common law, which are, indeed, a much more unerring guide than any particular case, of which it is ten to one whether you can obtain any correct and authentic report.

In the next place, if the experience of these warrants, had been so great, and no mischief to the subject had hitherto ensued; yet, who, in a very momentous concern, no less than the liberty of every man in England, would let even a possibility of abuse remain, that was able to get rid of it. It is not within the power of any legislature, to prevent every private man or minister from committing abuses by an infraction of the law; but, I think, no wise legislature would give such a sanction to any bad or arbitrary usage, as would afford a *handle* to all ministers to be guilty of the greatest abuses, impunedly and under the colour of law.

The pretence of public safety has nothing to do with the matter; for, although these general warrants were condemned, yet, as I said before, if in case of high treason there should be a necessity for the apprehending of people, together with their papers, whose names, or any certain and particular designations of their persons, could not be had, and this was made afterwards to appear; the Minister who issued such a warrant, evidently *pro salute reipublicæ*, need never fear any bad consequence to himself therefrom, altho' the same would be clearly illegal in not naming any body, and in commanding the seizure of papers at all. But I would have such things as emergent necessities applied to his pardon, not to his justification.

Upon a supposition that the foregoing arguments will not do, the Attorney closes his ratiocination on this point with saying, that "the Court of King's Bench had admitted persons to bail, apprehended under such warrants, instead of giving them their full discharge, and that this circumstance is of so much importance to the question of the legality of the warrants, that in the opinion of an old experienced and able lawyer upon the occasion, who will ever be esteemed an honour to his profession, it implies no less than an imputation of perjury, to suppose such practice to have prevailed in the court of King's Bench, unless the legality of the warrants had been at the same time acknowledged by that Court." Now, who this old lawyer is, I don't know, nor the date of the friendship between him and the Attorney. But, if I were to guess, it must be some old Tory, who till lately was as uniformly against, as he now is uniformly for, all measures. One of your staunch men that goes plump through thick and thin, and, to advance such doctrine, must I think have gone through the thickest of it, and consequently appear in a very dirty light to all other lawyers

lawyers upon his emerging. I dare say, 20 years ago, the same man would have vouched as strongly to the cure of the King's evil by the touch of the true royal line. In my conscience, he could find no one lawyer besides to countenance him in such doctrine; or, if he did, it must be some antiquated gentleman of the same Tory kidney, who only now comes out upon extraordinary occasions, with a grave face, to do extraordinary work. Now, to tell you the truth, the tory-principles, are such in point of government, that they have very little weight with any friend to liberty; and therefore, I should have been much better satisfied of the truth of this dogma, had the Attorney himself directly affirmed, upon the credit of his own character, as a lawyer, that an admission to bail under a General Warrant, proves either the warrant to be legal or the Judge to be perjured. But, it is very singular that the Attorney will not affirm any thing from himself in this matter, any more than he did upon the article of usage, but chuses to slip in the assertion of some old stager in Toryism, for the purpose, whom he puts in the front of the battle; and then, if he can but pick up some other superannuated being of the like original concoction, he will, of the two, I make no doubt, be able to form a most excellent forlorn hope. By the bye, if any old Black Letter could be brought up to such an affirmation, in a grave and serious manner, as *amicus curiæ*, I should think, under any other than the present Whig administration, his merit would be so transcendent, that he might expect the Ministers interest for a peerage for himself, or otherwise for his son, as he should like best. At this time, however, I should imagine, he would only find he had absolutely thrown away his character, to no purpose at all. Old Hunters say there is nothing like trying a man at once at a six bar gate; for, if he ventures to take that, you may be sure of his going over every thing else with ease.

In another place, the Attorney seems to repeat the same doctrine, in different words, by saying, that "the administration had exerted only such powers, as had frequently appeared before courts of Judicature, and had never been questioned in them, but by the practice of those courts had been acknowledged and confirmed."

Now, after all this, let me ask, Does the Court of *King's Bench*, or any other court, when a man is brought before them, under any warrant of apprehension. examine into that warrant, unless the person apprehended makes

any Objection thereto? Nay, is not the very contrary every day's experience? Is it not even the desire of the party taken up, nine times in ten, to be bailed; infomuch, as he knows that the taking an objection to the warrant will avail him but little if well founded, as, upon his discharge from that arrest, another warrant in a regular form would be immediately issued, and he would find himself forthwith in custody again, and all the money he had paid for litigating the former, be so much expence thrown away, to no effectual purpose at all? Would it be kindness to the party therefore, for a Judge to scrutinize the validity of every *capias*, or warrant of apprehension, when the party himself did not desire it? In truth, bailing is a matter of course, where no objection is taken, and there is no pretence for saying from thence, that this act of course is an acknowledgement by the Court of the validity of the warrant, or of the regularity of the arrest. Every apprehension is supposed to be legally made, if not complained of. It is a matter of form that no Judge attends to, without it be questioned by council before him. A man might as well suppose, that the Chancellor reads every writ he signs, before it is issued, to see whether it be clerically drawn; or that a Judge never tries a cause at *nisi prius*, until he has examined the whole of the process that founds it, and seen all to be regular and in due form in every part. Now, I will venture to affirm that Judges never examine into the regularity of any process at all, unless one of the parties take an objection, or move the Court specially for the purpose. *Consensus tollit errorem*. And, no man, ever before suggested that the Judges of a Court broke their oaths by not doing this *ex officio*; indeed, if the extravagant doctrine here advanced were true, not one of the present reverend bench of Judges could now be out of the horrid predicament of perjury. Nay, I will here again challenge the Attorney to say the contrary, if he dare. In short, such a speech if it were made, is a proof of nothing, but the shameless length to which party is capable of carrying a veteran stager: for, no lawyer ever practised in a court of law, especially at the head of a great circuit, that did not, in his own practice, meet with a multitude of instances, which flatly contradict this violent position. It happens to be an assertion, however, that is not very material, because, it is in the teeth of a known and ordinary fact that cannot be disputed; every common lawyer of a year's standing at the bar, being able to vouch to it. Nay, were it not so, the Attorney knows it to be a maxim among

among lawyers, that “ what is done without debate, or
 “ any argument or consideration had of it, makes the
 “ authority of a precedent to be of no force in point of
 “ law : for, in judgments and awards, given upon deli-
 “ beration and debate, only are proofs and arguments of
 “ weight ; and not any sudden act of the court without
 “ debate or deliberation.”

The Attorney fees nothing alarming in the seizure of a Member's papers and bureaux upon the charge of a Libel only, and reproaches a late writer with “ heightening the picture upon this occasion, by the introduction of “ sacks and messengers.” Now, I understand nothing is mentioned by this writer, that was not an undoubted fact, and, if I know the Attorney aright, he likes to debate upon a fact, and for that reason would throw every circumstance into a case, however unnecessary this may seem to many people who think it best always to argue and determine upon the general principle. Provided then the fact be so, I cannot conceive how any colouring whatever can exceed the life. I can frame to myself, no circumstance capable of adding to the terror of such a scene, whilst laws exist, unless it be the representation of the whole as transacted, and by particular order at midnight. I chuse, however, not to dwell upon this lawless part of the story, and, as my son in his letter hath said a good deal about the absolute illegality of the seizure of papers, in the case of any libel, I shall here say very little more concerning this abominable outrage ; altho', I think it the worst means to arrive at the worst ends imaginable.

According to my notions, no words can convey to the mind of the reader, the anxiety which a man may feel from such a distress. Many gentlemen have secret transactions and correspondences, which they keep from their wives, their relations, and their bosom friends. Every body has some private papers, that he would not on any account have revealed. What then, can be more excruciating torture to any gentleman, who thinks himself in a free country, than to have the lowest of mankind, such fellows as Mooney, Watson, and the rest of them, enter suddenly into his house, and forcibly carry away his scrutores, with all his papers of every kind, under a pretence of law, *because* the Attorney-General had, *ex officio* filed an information against the Author, printer and publisher of some pamphlet or weekly paper, and somebody had told one of these common greyhounds, that this gentleman was thought by some people to be the author ! These
 papers

papers are immediately to be thrown into the hands of some clerks, of much curiosity, and of very little business in the times of peace, who will, upon being bid to sort and select those that relate to such and such a particular thing, naturally amuse themselves with the perusal of all the private letters, memorandums, secrets and intrigues, of the gentleman himself, and of all his friends and acquaintance of both sexes. In the hurry too of such a business, notes, bonds, or even deeds of the utmost consequence to private property, may be lost, torn or destroyed, without any wilful intention of so doing.

I will now, for a moment, suppose that this gentleman had actually wrote, in the hours of his wantonness or folly, something that was really abusive and scandalous upon some particular minister, or upon the administration in general. Even in such a case, would any Gentleman in this kingdom rest one minute at ease in his bed, if he thought that every loose and unguarded, or supposed libellous, expression, about party matters, he was liable not only to be taken up himself, but every secret of his family made subject to the inspection of a whole Secretary of State's Office, or indeed, of any man or minister whatever, whilst a parliament was sitting or had even an existence in the country? Such a vexatious authority, in the hands of any creature of a minister, or of the crown, is inconsistent with every idea of liberty, and the rights and prerogatives of freemen. It seems to me too, to be the highest of libels upon the constitution to pretend, that any express law or legal usage can justify such an act of arbitrary government. The laws of England are so tender to every man accused, even of capital crimes, that they do not permit him to be put to torture to extort a confession, nor oblige him to answer any question that will tend to accuse himself. How then can it be supposed for one moment, that the Law will intrust any officer of the Crown, with the power of charging any man in the Kingdom (or, indeed, every man by possibility and nobody in particular) at his will and pleasure, with being author, printer, or publisher of such a paper, which he forsooth informs against as a libel, and which, till a jury has determined to be so, is nothing; and that upon this *charge*, thus made at discretion, any common fellows under the pretence of a General Warrant, upon their own imaginations, or the surmises of their acquaintance, or upon other worse and more dangerous intimations, may, with a strong hand, seize and carry off all the papers of any gentleman
what-

whatever; and then at his trial produce these very papers, thus taken by force from him, in evidence against himself; and all this on the charge of a mere misdemeanor, in a free country. This would be, contrary to the established rules of law, making a man give evidence against and accuse himself, with a vengeance. And all this distress and outrage is to be endured, because the prosecutor wants other sufficient proof, and so might be traduced for acting groundlessly, if he could not get it; and because he does it truly for the sake of *collecting evidence*.

I should not have given myself the trouble of even saying thus much in so plain a matter, had it not been for a letter which was printed some time ago, upon this subject, with the names of two noble lords, secretaries of state, subscribed. Whether it be genuine or not, I cannot tell, but it is directed, "to Mr. Wilkes," and dated "Great George-street, May the 7th, 1763," and contains the following expressions:

"S I R,

"In answer to your letter of yesterday, we acquaint you, that your papers were seized in consequence of the heavy charge brought against you, for being the author of an infamous and seditious libel, for which, notwithstanding your discharge from your commitment to the Tower, His Majesty has ordered you to be prosecuted, by his Attorney General. Such of your papers as do not lead to a proof of your guilt, shall be restored to you: Such as are necessary for that purpose, it was our duty to deliver over to those, whose office it is to *collect the evidence*, and manage the prosecution against you. We are

"Your humble Servants,

"Egremont.

"Dunk Halifax."

Here now is a clear avowal of the sole end and principle, of taking these papers, and for that alone I have transcribed the foregoing. The evidence indeed, seems to have been *collected* with as much force, and I believe with as little right by law, as some other collections are made for which the collectors are hanged when taken. I cannot, but say therefore, I am very glad this letter has been published, that the Public may see what is the common notion of law in those political offices, that are now attempting to prove their lawless practices to be the ancient common law of the Land. For, as to the letter to which this was an answer, I am ready to confess, I never saw any

any thing more indecent or scurrilous, or more unbecoming any gentleman towards men of such high rank in their own persons, as well as by their posts, and, for aught I ever heard to the contrary, of very great honour in their private characters. It is the law, the matter of right alone, that I meddle with or care about, as an Englishman. I will add too, I can much sooner excuse an infringement even of an important law in gentlemen never bred to the study or practice of it, than I can any the least deviation or tergiversation in a lawyer himself, who must always know at the time that he is committing violence, and by so doing, premeditatedly injures the rights of the subject at large.

One instance of the legislature's regard to the privacy of papers and correspondence, may be seen in the act, regulating the post-office, whereby, every post master and clerk, is forbid to open any letter, in their custody or hands, upon any pretence whatever, except, by virtue of an order from the King's principal Secretary of State; who, if the mere opening should afterwards be questioned, is thereby rendered under his hand responsible for the same.

The Attorney, having slightly passed over the seizure of papers, after talking of it as a mere picture for which he happened to have no taste, *intirely* omits the subsequent grievance of the *close* confinement; and, my son having somewhat touched that matter in his letter, I shall not expatiate upon the subject, so much, at least, as the importance of it would otherwise have inclined me to. Any body, however, who looks at the warrant of commitment, will see the direction to the constable of the Tower, is not merely to keep Mr. Wilkes safe, but "to keep him safe and *close*, until he shall be delivered by due course of law." Now, I apprehend, that the custody here directed, is unwarrantable in law, in the case of a misdemeanor.

The common commitments used by Justices of Peace, even in cases of Robbery or the High-way, and other felonies, not entitled to clergy, are *to receive into your goal and him safely to keep, or that you safely keep, or there to remain (until delivered by law;) salvo custodiri, ad salvo custodiendum, salvo custodias, in salva custodia ut detineatur; or at most salvo & secure custodiri*: insomuch, that out of all the various forms of mittimus's to be met with in *Burn's Justice*, or the *Registrum Brevium*, there is not one where the word *close* or *arēta* is inserted.

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When a goaler is to keep his prisoner safe, he is only to restrain him so as to prevent his escape, and no person not dangerous, in that respect, is to be hindered from having access to him, in the day-time. But, when the order is to keep the prisoner safe and *close*, the goaler is to let nobody whatever have access to him, and is to shut him up from all the world. By a printed paper too handed about, I learn that the warders of the Tower, in this last case, are never to leave their prisoner one moment alone, nor to permit any person to have admittance to the room he is confined in, or to speak to him, but by particular order. And, in a paper which Mr. Wilkes dispersed, he asserted (how truly, I know not) that these orders were strictly observed with respect to him, insomuch, that altho' he was committed Saturday the 30th of April, yet it was Tuesday May the 3d, after having been brought up by Habeas Corpus, to the Court of Common Pleas and remanded, before his friends had for the first time, free access to him. According to his account, his council and attorney had made repeated applications for admission on Saturday, Sunday and Monday, as well as his brother, a noble Earl, and several people of distinction; and that on the Monday, he happened to see himself a written order lying upon Major Ransford's table, directing him even to take down the names of all persons applying for admittance. Indeed, I remember the common report about town, at that time, was, that the Secretary of State went to his country-house the Saturday morning, and did not return 'till Tuesday noon, and therefore, no order for the admission of any person could be had, and that the Major would not break through his general orders about *close* prisoners at the mere desire of the solicitor of the treasury: but I presume, this could never be the reason, as it was very easy to have sent a messenger 10 or 12 miles out of town, to the Secretary's villa, upon such an occasion, when the prisoner was a Member of Parliament, and the public began to be alarmed.

And therefore, I am more inclined to believe another report, and which indeed, I have had from better authority, namely, that the Major received particular, positive, verbal orders at first, to let nobody have access to him, and that he declared, had it not been for Thöse, he should not have scrupled to have let in any of Mr. Wilkes's friends or relations, notwithstanding the word *close* was inserted in the warrant. In short, it was a misconception of the lawful power, in the article of libels. The great
civil

civil officers imagined there was no difference at all made by the law between the treatment of a prisoner for a misdemeanor, and of one for a capital crime, that is, for high treason or felony without benefit of clergy, and before or after conviction.

Now, my opinion is, that before conviction the Law does not warrant close confinement, so as to debar a friend from access, in any case whatever; and that the same is a breach of the great *Habeas Corpus* law, and of all the statutes *de Homine replegiando*. For, if a man when apprehended and carried before a magistrate, is, by that magistrate sent and committed forthwith to close custody, so that no body can get at him, it will be impossible for him to desire a friend to write a letter, or to make an affidavit, to get a *Habeas Corpus* for his being brought before some Judge or Court in order to be bailed. Indeed, it seems to me to be an absolute deprivation of the right that every subject has to that writ, and in consequence thereof, to his liberty on bail and mainprize, except he be committed for treason or felony plainly expressed in the warrant; "or unless it shall appear that the party so committed, is detained upon a legal process, order or warrant, "out of some court that has a jurisdiction of criminal "matters, or by some warrant of some Judge or Justice "of Peace, for such matter or offence for which by law "the prisoner is not bailable." This statute of Charles the 2d, takes notice of the "great delays and other *Shifts* "of goalers and others, contrary to the known laws, "whereby, many of the King's subjects hereafter may be "long detained in prison, in such cases, where by law "they are bailable, to their great charges and vexation, "and purports to be expressly enacted, for the prevention thereof, and the more speedy relief of all persons "imprisoned for any such criminal or supposed criminal "matters." Now, if I do not misremember, the five members were committed to *close* confinement, for seditious discourses in Parliament, by Charles the 1st, and it was the agitation of this very question that first shook the throne under that King; and yet, I do not know, that in the case of Mr. Wilkes, it has ever been taken notice of at all, either in parliament or in any court of Justice.

However, I cannot forbear declaring, that I look upon close custody in such an offence as a libel, the least definable and the most ambiguous of all misdemeanors, and by construction only a breach of the peace, to be not only absolutely illegal, but extreme cruelty in itself, and, with respect

respect to the constitution the most lawless tyranny that can be exerted by any minister, and such as ought to make every gentleman startle, when he thinks of it only.

If any man, upon this point, after reflection and better information, declares he has done wrong, and that it was merely through ignorance, and he is very sorry for it; there is nothing more to be said personally to him, seeing it is not the corporal injury that constitutes, in the eyes of mankind, the dreadfulneſs of the example. It is the force exerted and continued against law, which makes the tyranny.

I vow to God, I have no antipathies or personal causes of resentment to any one great man in the kingdom; and therefore, say nothing from the spirit of private animosity. But, when I see a ſecretary of ſtate, obſtinately fighting with the laws of his country, uſing privilege to the utmoſt, notwithstanding it was the ground of the royal complaint to the Commons againſt Mr. Wilkes, and ſtanding out all the proceſs and penalties of a court of Juſtice, to avoid trying the right of a tranſaction, which has never yet been directly given up; and perhaps waiting for an outlawry of his proſecutor, in order then to mock the juſtice of his country ſtill more, by entering an appearance to the ſuit againſt him, at a time, when his proſecutor can no longer go on with it, being an outcaſt of the law itſelf, and conſequently intitled to no benefit from it: I proteſt, I ſay, altho' an old, ſober, private individual, when I ſee all this, that I loſe my temper, look for redreſs from ſome other quarter, and feel myſelf inclined to join in an addreſs to the commons of England, to take up the conſideration, and go on with the proſecution of that great cauſe, which every Freeman is intereſted in, and which the ordinary courts of juſtice have been ſo long ſoiled in. And here I will ſtop, for a time at leaſt; altho' I remember what is Mr. Locke's definition of liberty; what he makes the province of a court of judicature, and what the extent of the legiſlative power; and what, according to him, creates a diſſolution of all government.

How can any miniſter think of eluding the laws, when he conſiders that kings, the ſupreme magiſtrates of this country, hold their crown by no other tenure, and are ſworn and bound by law, at the peril of that very crown itſelf. There is no ſuch being among us as a dictator. Our conſtitution admits of no arbitrary will or pleaſure in any man. The law is the ſole ſovereign of England, and That law is known and ſettled. It is fixed on the
firm

firm basis of immemorial usage, fortified by innumerable precedents through a succession of ages, and upon the statutes of king, lords and commons. And, it is this circumstance which makes the security, the independence, and the pre-eminent felicity of Englishmen, in contradistinction to the subjects of all other realms upon the face of the globe. What a comfort it is to every man, who either raises or inherits a fortune, to hold That and his liberty by the same and as good a title as his King holds his crown? Who therefore, that has a grain of spirit would barter one single point of this antient constitution, for the temporary enjoyment of a pension or place, or the pitiful servility of pleasing a mere man at any particular season, and thereby throw both himself and his posterity into the lasting bonds of infamous slavery? What gewgaw or pageantry of a court can sink a man so low as to submit to enjoy, all that he has, by the mere grace and favour of a man like himself, instead of holding it independent of every thing upon earth, but the known laws of his country.

The inquiry, in this letter, is not at all about complaisance and politeness, or what a subject might possibly procure by mercy, courtesy or bounty; but, about the law, the birthright of an Englishman, his liberty and property. When the question turns upon the mere lawfulness and right of a freeman, it is no other than an impertinent evasion, a well-bred insolence and a lordly despotism to insinuate, that, although there is power enough to ruin him, yet, from a motive of compassion, and a graciousness of disposition, this power should not be used if he behaved well, and dropped his offensive pretensions.

It would, in my poor opinion, be of infinite use to young men of fortune, beginning the great world, who may hereafter be ministers of state, to read attentively the reign of Charles the 1st, in the annals of Frankland, the diary of Rushworth and Whitelocke; and, even the causes of the troubles of his government, with the best apology that could be made for them, as set forth by a divine-hereditary-right man, Lord Clarendon; together with Ludlow and the Parliamentary History for that period. They would soon perceive, what mighty ill consequences flow from small beginnings, and particularly, from right not being to be had for the subjects in courts of justice. I think, the perusal of these writers, with Hooker, Milton, Sidney, Locke, Burnet, and the common memoirs of the publick proceedings for twelve years before the coronation of William the third, will be of more service and infor-

mation, in the study of the rights of the people, and the prerogative of the crown, than all revolutions of the Jesuit d'Orleans, or the conceits of Mr. Hume, although they both express themselves well, and the former (altho' the professed advocate for the Stuart family) was the first writer of English history, put into a certain most amiable Prince's hand by a certain person, and the latter is, I know, a favourite author, writes prettily and ingeniously, notes the progress of arts and sciences, refines on common matters, and will for ever amuse by the new and fanciful turn he gives to every thing his pen touches. Whether he be or not really happy in his conjectures, sound in his judgment and faithful in his narration, qualities, however, requisite in an historian, that are notwithstanding less brilliant and striking than paradox and novelty, the salubrious fountains from whence our modern *British* historian, derives his indifference about religious, or rather his ridicule of every protestant, when opposed to the catholic faith, as well as his indifference about politics, or rather his ridicule of all Commonwealthsmen when opposed to Royalists.

The Attorney wonders, what should occasion "any alarm" and says, one would think, "that some innocent man" had been oppressed by arbitrary violence, tyranny, and "persecution." To which, I shall only say, that the legality of the arrest itself by virtue of such a warrant, and not the innocence of the man arrested, is the matter in question; and, that it is a common but a paltry trick in party-writers to go off from the discussion of measures, to the discussion of persons. In short, it matters not at all to the point in agitation, whether this unnecessary outrage of law, were committed on the real writer of the paper charged as a libel, or on any other more amiable person. The validity of the warrants will be the same.

The Attorney might as well go on to talk of the qualities of the writer's mind, and endeavour to shew that he was a ludicrous, extravagant, profligate, debauched and blasphemous fellow, and wrote an infamous poem, whereby he excited the indignation of a grave and pious nobleman, who, from a motive of conscience complained of him to the house of lords, for thus disporting himself in the works of Vice, to the great horror of his lordship; and that therefore, such a man might be treated as administration should please, without any regard to law or the constitution, and that, instead of protecting the franchises of their countrymen, the parliament should only settle the morals of individuals. The Attorney concludes on this

head, with asking whether all the printers and other " parties aggrieved, deny that they have ample satisfaction," whereby he indirectly admits that they had been *aggrieved*, but then insinuates, that as money is in his mind the measure of all things, and an adequate consideration either for a broken head or a broken constitution, so there has been no harm done at all, but what is now compleatly paid for. Let me ask, were these damages offered or even paid voluntarily, so soon as the unlawfulness of the act was discovered, from any motive of justice or acknowledgement of error? Or, were they obtained, in short extorted, by the verdict of a constitutional jury; after every means to delay and to defeat the action, to stagger the judge who tried the cause (but who was too firm to be frightened, and too able to be imposed upon) and finally, to suspend indefinitely the judgment upon this verdict, by the dernier resort, a bill of exceptions, had been tried in vain? After all this, were the exceptions tendered with such earnestness, and so much appearance of sincerity, ever argued or deemed capable of support in any court of law whatever? Or, were the persons, who took them, after these fruitless attempts to delude mankind, under the sacred names of law and constitution, obliged, like convicted jugglers, to give up the game, and, as the last shift, to buy off clandestinely the verdicts so publicly obtained, in hopes, by a private barter of satisfaction and release from low and ignorant prosecutors, to nick an attorney, who had laboured a just and a national suit, out of his costs? Is this, or is it not the Truth; and is or is it not a handsome come off, or a reputable way of giving up a great cause, where the Crown has thought proper by its Attorney General to take up the defence? *Sume superbiam quæsitam meritis.*

But, in God's name, what have damages to do with the point the Attorney is arguing, which is, whether the Commons of England, as the guardians of the rights of the people, should or should not come to a strong resolution upon such an infringement of the constitution by a King's minister, in order to brand such an alarming practice, and to remain as a monument of the immediate interposition of parliament to vindicate the established law, and to stigmatize so audacious a breach of it, when perpetrated not by an ordinary person, but by the hand of power, a great officer of the crown. Most people are of opinion, that, when a power, dangerous at any time to be exercised, is made use of in an ordinary point unnecessarily, the Parliament

ment should immediately come to a resolution, to brand so violent and irregular step, and, if the circumstances required it, to stigmatize the person who took it. The less the occasion was for this illegal act, the more alarming it is, because, it looks as if great men chose to act by the authority of the crown, instead of acting by that of the law, and the more it had become of late the usage to exercise this power, that is, the greater sanction it might seem to have derived from any uninterrupted practice of twenty or thirty years, the more necessary it might seem to come to such a resolution: especially, too, if this power had been evidently abused, by being exerted in the case of a misdemeanor, of all the species the lowest of crimes, and even in the most dubious of all misdemeanors, and above all, if it were in a time of the profoundest tranquillity, when all parties were striving who should be foremost in shewing their sincere attachment to the person of their sovereign. A power notoriously and confessed illegal, seems to need no great examination, but if it did, people without doors are apt to think, that those within should have given it that examination, and all the "gravity and deliberation," by going into a Committee, that one of their resolutions might seem to require. It was early in the Session, when this matter was agitated, so that there was no want of time, and it was a point that interested people's attention more than any other. If the Resolution were confined to the case in question, and so drawn as to apply to it exactly, it could neither appear "insufficient or futile." The conduct of the present parliament proves this; for, it has shewn that it chuses to go so far as the case before will warrant or make necessary, and no farther. In the matter of privilege recently agitated, the Commons confined their Resolution, and the Lords followed them therein, to the single case of seditious libels. And yet the rumour is, that many Members of both Houses, said and thought that this case afforded a proper opportunity for coming to a general resolution, taking away privilege from all breaches of peace, whether actual or constructive only, and from all misdemeanors whatever. This, therefore, is a flat answer to the Attorney. Upon the present head, however, I must allow it is reported, several great commoners contended warmly that the Resolution touching warrants should have been general, declaring General Warrants to be illegal and invalid in all cases whatever. It appears too, that the motion first made to the House was of this kind, and it is said, that the King's Attorney and Advocate General, were

the persons who moved the amendments, which reduced this general motion to the simple case directly before them: However, as the present parliament has in these two instances, shewn its approbation of coming to resolutions only upon the cases that have actually appeared before it; neither the Attorney nor myself, are at liberty to gainsay it, and therefore, I cannot join with him in censuring this mode of proceeding. As they have adopted it, I cannot suffer myself to say, that, "a resolution upon the journals, confined to the case of seditious libels only, left the warrants, in all other cases, still more confirmed and authorized by that tacit approbation." I do not think so. And I will venture to ask him, whether he thinks that the Parliament, by declaring no privilege lies in the case of that single misdemeanor, a libel, has thereby tacitly approved and confirmed its privilege in all other misdemeanors. I should rather reason, that when a Parliament condemns any thing in one case, it intimates a disapprobation of every similar case and of every the like species, altho' they have not named them expressly in their resolution, nor damned them in so many words. Indeed, were I capable of thinking, that the Gentlemen, who opposed the general resolution first proposed about warrants and stated, contended for and carried a resolution adapted only to a particular case, which the House thereupon took for its question in the debate, intended thereby a *tacit approbation* of and *more to confirm and authorize* the practice of General Warrants in all cases but that of seditious libels, I confess, I should be more alarmed than ever. But, I dare say, the Attorney here reasons from himself, and not from any authority of state.

But the Attorney, however, is afraid that the Lords might differ from the Commons, either as a house of parliament, or as a court of judicature. He need not fear this at all; it is impossible in a perfectly clear case. Nay, I can rid him of this being any motive, by what has happened this very session. Let him only look back to the proceedings, and he will find that the present parliament took notice of *The North Briton*, No. 45, in consequence of the King's message, and upon the mere view of the paper itself, without inquiring into the truth of any circumstances, that the author might rely upon or the public's opinion of his intent thereby, determined it unanimously to be a libel; and yet, this is not only what great Judges esteem a mere point of law, but what they hold likewise to be a very difficult point of law. This was done too
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without any previous communication with the Lords. The Commons even went farther, for, they afterwards called for evidence, in order to find out who was the author, and it appearing to them, altho' the witnesses not upon oath, that one of their own members was so, they * expelled him, after sitting, debating and deliberating on their conduct till half an hour after three in the morning. Now, this last was a fact, which by the constitution of this country is to be tried by a Jury. Nay, the Commons came to both these resolutions, whilst the same matter was in a course of trial before a jury in the courts below; where it was possible that it might be differently determined. For, nobody can tell what a jury will do in a libel; and they generally determine both the law and the fact, as it is called †: but, suppose them to be so docile as to find only that such a man had published the paper, and to leave the construction thereof to the Court, and that the Judge who presided was one of those intrepid magistrates, who do not care at all for the resolution of a House of Commons upon a point of law; it is surely, very possible, that such a judge might have made a different determination from what the House had done. And then even this Judgment might have been carried "by appeal to the Lords, who in their judicial capacity might think fit to "declare the legality of" the paper in question, "to confirm the practice" of discussing without doors the truth of the speech from the throne, and to affirm the judgment of the King's Bench. Notwithstanding therefore, this matter was in a way of trial below, and notwithstanding the Lords, both as a house of parliament and a court of judi-

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* Vide the printed Votes of Thursday Jan. 19, 1764.

† This very thing happened in New York in America, where the form of government is the same as in England; the Governor, Council and Assembly, answering to King, Lords and Commons. Now, in the case of one Zenger, a printer, the "Council by their Resolution, declared the papers published "by him to be *false, scandalous, malicious and seditious libels*. "As the Jury upon his trial were upon their oaths, and thereby bound to deliver their own opinions, and not that of the "Council, they thought themselves obliged to acquit the prisoner, by returning a verdict, *not Guilty*; which is the Verdict every Jurymen is in conscience bound to return, if he "thinks that the prisoner is not guilty of the crime charged in "the Indictment or Information." Preface to Zenger's trial, which contains many things very well worth reading.

cature might have differed from the Commons, yet they determined both the law and the fact; without being afraid as the Attorney is for them "either that the Courts of law must be divided and confounded in their opinions, or that the dignity of the house of Commons must suffer in the neglect and contempt of their resolution." They judged, I presume, that in a clear matter such difference of opinion could not arise, that the paper was so clearly a libel nobody could doubt of it, that it was a matter of national moment not to be procrastinated, and that therefore, they not only might, but ought to pronounce their opinion upon it. According to the Attorney's doctrine, a house of Commons should not venture to declare that two and two made four, before a Court of law had told them so. But, in short, this has never been their practice. It is not fit, they should interfere where the public is not deeply interested, but where it is, they are bound to do so, in justice to their representatives, and they always have done so. Nay, they have gone further, and where the necessity was great, they have even come to a resolution in point of law, contrary to the judgment of a court of law, and to the opinion of ten out of twelve judges. Where they suspected any undue influence, either in the exertion or the support of Prerogative, by Officers of the crown or by Judges, they have always interposed. Is it possible, to forget or to controvert either their conduct, or the propriety of it, in the great case of ship-money, which was first brought into question by Mr. Hampden, a private gentleman, who, so far from regarding the trumpery, pettifogging consideration of damages, declared that he would not pay it were it but one farthing, if pretended to be demanded of right and by colour of law, and, yet proceeded, according to my Lord Clarendon's own account, with great temper and moderation in that suit. His Lordship adds, and all the world knows, that never any cause had been debated and argued more solemnly before the Judges; who, after long deliberation among themselves, and being attended with the records, which had been cited on both sides, delivered each man his opinion, and judgment, publicly, in court; and so largely, that but two judges argued in a day. Ten of them solemnly pronounced their opinion for the right claimed by the Crown, and which it had regularly for four years immediately preceding; but, as Lord Clarendon observes, the judgment proved of more credit and advantage to the gentleman condemned, than to the King's service. However,
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adds he, " these errors in government were not to be im-
 " puted to the court at that time, but to the spirit and
 " over-activity of the lawyers of the privy council, who
 " should more carefully have preserved their profession and
 " its professors, from being profaned by those services
 " which have rendered both so obnoxious to reproach." In
 short, the House of Commons entered into the public grie-
 vances, and notwithstanding the right of levying ship-mo-
 ney was a mere point of law, and there had been the fore-
 mentioned solemn adjudication by the whole bench of judges
 in it, they ordered that the records, inrolments, judgments
 and proceedings in the exchequer, and all other courts
 whatsoever concerning ship-money, should be sent for,
 and warrants signed by the Speaker, directed to the offi-
 cers of the several courts for these matters, were issued out
 accordingly. In consequence of this, a committee was
 appointed, and upon the report of that Committee, the
 Commons resolved " that the charge imposed upon the
 " subjects, and the assessments for that purpose, common-
 " ly called ship-money, are against the laws of the realm ;
 " and that all the writs, commonly called ship writs, and
 " the judgment in the Exchequer in Mr. Hampden's case,
 " in the matter and substance thereof, that he was any
 " wise chargeable thereby, are against the laws of the
 " realm." In the matter of libel, they considered the
 case of Barton, Bastwick and Prynne, and resolved, the
 judgment and sentence of the Court of *King's Bench*, to
 be illegal and unjust : and, so they did in the case of Lil-
 burn. In the same Session of Parliament, the Commons
 entered into a consideration of the ecclesiastical power by
 law, and resolved " That the clergy of England, con-
 " vened in any convocation, or synod, or otherwise, have
 " no power to make any constitutions, canons or acts
 " whatsoever, in matter of doctrine, discipline or other-
 " wise, to bind the clergy and laity of this land, without
 " common consent of parliament; and that the several
 " constitutions and canons, treated upon by Arch-Bishops
 " of Canterbury and York, presidents of the respective
 " convocations for those provinces, with the rest of the
 " Bishops and clergy, and agreed on, with the King's li-
 " cence, in their several synods, do not bind the clergy
 " or laity of this land, or either of them." And it was
 " further resolved, That the said canons and constitutions
 " do contain in them many matters contrary to the King's
 " prerogative, to the fundamental laws and statutes of this
 " realm, to the right of parliaments, to the property and
 " liberty

“ liberty of the subjects, and are matters of dangerous consequence.” The same Parliament, likewise took notice even of the transactions in another kingdom, and resolved that several proceedings by the Lord Lieutenant of *Ireland*, were unjust and illegal; and that the Judges there were fit to be questioned as criminal, for their extrajudicial proceedings and opinions. From multitudes of instances, where the commons have come to a resolution with respect to matters of law, I have only selected these few, in order to shew, that they have done so, when the House was filled with great, constitutional lawyers, where the same point had been already and differently determined by a court of law, and even by all the judges; in matters of universal concern, and in particular cases, and even with respect to Libellers; in points both of Common and Ecclesiastical law; within and without the realm of England: and that this they have done without any conference with the Lords, and not as a foundation for any bill, and, yet their resolution has been obeyed and conformed to ever since as law, by every court of judicature in the kingdom. A Resolution, by the bye, of the present House of Commons would be equally respected, I doubt not, whatever big words any man may throw out to the contrary, by every Judge; and to say the truth, I never knew a dealer in such sort of speech that had a single grain of true spirit or bottom, when he came to be tried. This being the practice of these guardians of the people’s rights, upon former occasions, makes me more curious than ever to know what it was that influenced the present parliament, after inquiry and proof of General Warrants being clearly contrary to law, to refrain from condemning the usage of them by Secretaries of State, or any other authority whatever. The more especially, as it will appear hereafter by the Votes and Journals, that a gross complaint had been made of the abuse of these warrants, in the case of one of their own Members, and that the debate upon the question of their validity, had been the longest to be met with since Parliaments have had a being. We who are living know very well from the Members of all parties, that nobody attempted to vindicate the legality of these warrants; but, our posterity will not have the same oral satisfaction, and must naturally conclude, from their not being declared illegal, according to the antient usage of the House in matters of like universal concern, that something appeared which rendered the point of law very problematical. Indeed, it must from reason seem to every reader, that altho’ the

the House inquired into the matter, on account of its infinite consequence to the liberty of every man, yet, that it could not be warranted in passing a censure upon those who had used these warrants; nay, was on the contrary obliged to hold them justified, and to discharge the complaint against them, however much the House might wish to damn such warrants, if not in all cases, yet, at least, in that of misdemeanors and libels. and with that view had apparently narrowed and altered the first proposed resolution to one of a very particular and circumscribed nature. In short, the natural conclusion * from the printed votes and journals must be, that the Commons could not find any ground for condemning general Warrants in all cases, or even in the single case of a libel, altho' it was accompanied with an order to seize papers; insomuch, that I should think an able man would hereafter alledge the present proceedings, as a justification not only of these General Warrants for the seizure of persons, but also of papers, even in the case of a misdemeanor, so that this usage will be apt to gain strength from what has passed, as *non regredi est progredi* in such an enterprize as this. And, I am sure, that the single obiter saying of a Judge at *Nisi prius*, or even the judgment of a Court of law, will not be sufficient to restrain future ministers, who may be hurt by what is published against them, from using this general, sweeping power, when they find, that a House of Commons will not interfere in the case, how much soever it may be complained of, but, on the contrary, will discharge such complaint and vindicate the persons against whom it is made. For which reasons, I wish, with all my heart, this affair had never been agitated in parliament; because I disapprove the Practice most heartily, and am sorry that any time serving, political Judge hereafter, should have so good a pretext for using his discretion in the determination of the point, and for not being afraid of parliaments calling him to an account for what he should do; it having been a question once fully before the House, and which they declined after long deliberation to meddle with by any decision at all.

It is however most undoubtedly a point of very extensive consequence both to the liberty and property of every man of every kind, and the Attorney therefore is a little too hasty, triumphant, and dogmatical, in concluding that the true question was only “ whether the ministry should suffer
“ them-

* *Vide* the printed Votes of Jan. 20, Feb. 20, 13, 14, and 17, 1764.

" themselves to be the dupes of a party." A very satisfactory apology and vindication, truly, for all that they have done ! For, as to his round assertion, that is a " power " which the best friends to liberty had never scrupled to " exercise ;" it is a *gratis dictum*, untrue in itself, and, if it were true, nothing to the purpose.

Thus much, I have thought myself obliged to say, not only in support of my own freedom as a man, but likewise, in honour of the ministry, who must, I think, be highly displeased with the over-weening presumption of an Attorney, in advancing out of doors what no minister, nor even the Attorney General himself would venture to assert within doors. It is an arrogance in any single man to attempt such a thing, under the colour too of delivering what was urged in the House ; and it is still more extraordinary to do this, without pretending to write from any motive of conscience, or to assert that what he has advanced is even his own deliberate opinion, and what he will stand by as a lawyer of skill and integrity in his profession.

As to what he has said with regard to the insignificance of the mere resolution of the house of commons, I do recollect that something of a like sort, was flung out by one learned gentleman, who, indeed, closed the whole of his argument on this point, by saying, that " had he the honour of presiding in any court of law, he should regard such a resolution no more than he would that of so many " drunken porters in Covent Garden." It would not, perhaps be " a judicial determination of the law, which " might be pleaded in a court of judicature, and would " only be a declaration of the sense of the law," by all the commons of England. And, without doubt, if the resolution of one house would be of no weight with this gentleman, the resolutions of both houses would be of none. Nothing but the concurrence of King, Lords and Commons will do for him. These are big words, and yet I dare say, he would be confoundedly frightened with a single vote of either house, should he live to experience it. I will not say, that the two houses have ever gone so far as to *make law*, altho', I believe, they have gone so far as to make a king ; but this I am sure of, that they have very often *declared* what the law was, in very great points, and this is all that was contended for. In times more remote, when houses of commons were not so scrupulous, they have frequently come to resolutions declaratory of the law ; as any one may see, by reading an account of their proceedings in the reign of Charles the 1st, when headed by Sir Edward Coke

Coke, Selden, Glanville, and the great lawyers of those days: and this right they continued to claim and to exercise when Mr. Somers, Serjeant Maynard, Sir William Jones, Sir Francis Winnington and other lawyers, undertook to conduct them prior to the Revolution, which last transaction, altho' wearing away very fast in remembrance, is a period of history not yet absolutely forgotten. At that time, some of the men I have named were thought to understand the constitution; they had lived in ticklish times and studied it closely: nevertheless, I do not in this respect, mean to compare them with the respectable person I have just now alluded to, altho' they had certainly attended the house much more than he has done.

In those times it was the notion that, upon an illegal arrest, or other violation, by a great Minister, of a member of their house, it was necessary to come to a resolution forthwith, concerning the law upon that head, without waiting for the slow, and possibly ineffectual, proceedings of a Court of Justice, where a mere mistake, in the manner of pleading, might delay for a year, or possibly frustrate intirely the suit. The parliament was indeed, I know, anciently called, *commune consilium regni*, *communis reipublicæ sponso*; denominations now utterly buried in oblivion: nevertheless I cannot even yet regard a resolution of the Commons, in the same light with the Attorney, as "a mere amusement;" because, if by virtue of any resolution of theirs, whether the same may be pleaded in a regular plea or not, a man be committed to Newgate, the Court of *King's Bench* will never venture to question the legality of the proceeding. When the Honourable Alexander Murray was so committed, I remember that a late great patriot, Sir John Phillips, put on his gown, and came into the court on purpose "to make a motion," as he phrased it, "in the cause of liberty," and so prayed a Habeas Corpus for the said Mr. Murray; which was accordingly granted of course, and he was brought up thereupon. The cause of his imprisonment, returned at the same time by the goaler, was only an order of the House of Commons, without any crime whatever alledged. The Judges, however, said they could not question the authority of that house, or demand the cause of their commitment, or judge the same; and therefore refused to discharge the prisoner, maugre all the patriot's arguments to the contrary, and so remanded him. Nay, I will mention to the Attorney one other case, which will be worth his considering, before he flights the notice of a resolution of the

the Commons. In the year 1689, one Topham, the Serjeant of the House, complained that, being served with several actions, for taking persons into custody by order of the House, his pleas, in justification of having acted by virtue of their order, had been over-ruled in the *King's Bench*. The Commons thereupon resolved, " That the " said different judgments, given in the King's Bench " against the said Topham, are illegal, and a violation of " the privileges of Parliament, and pernicious to the " rights of Parliament; and that a bill be brought in to " reverse the said judgments;" and they ordered that those of the Judges who were living should attend; which they did. Sir Francis Pemberton, (who had been the Chief Justice) being desired to give his reasons for over-ruling the Plea of the order of that House, in the case of Jay and Topham, replied, " That he knew little of the " case, it was so long since. But that in case the Defendant should plead he did arrest the plaintiff by order " of this House, and should plead That to the jurisdiction " of the *King's Bench*, he thought, with submission, he " could satisfy the House that such a Plea ought to be " over-ruled: and that he took the Law to be so clearly." He then withdrew; and Sir Thomas Jones (a puisne Judge) being examined, said, " That it was long since, " and, not knowing what he was to attend upon, could " give no account thereof: but, that if any such judgment was given, he hoped it was according to law, as " the matter was *pleaded*;" and then withdrew. Sir F. Pemberton was again called, and his reasons being demanded for his general assertion before said; he desired time to answer, both to the whole together, and the particular case of Jay and Topham. But an immediate answer being insisted on, he said, " That what he spoke " was *quoad hoc* to that case; however, he gave what he " had said, for his present thoughts and reasons." Being withdrawn, the House resolved, after a debate, " That " the orders and proceedings of this House, being *pleaded* " to the jurisdiction of the court of King's Bench, ought " not to be over-ruled." They then ordered these two Judges to attend again on another day; when they were severally examined, touching their reasons for over-ruling the plea of Serjeant Topham to the action brought against him by Jay, and ordered into custody of the Serjeant at arms.

The Attorney, however, adds, that even the Resolution contended for would have been of no utility, had it been

been agreed to, and been in force; because it might have been easily evaded: and then states two or three cunning devices as "evasions, which he conceives would frustrate the resolution, and consequently render it, in effect, no security at all." A change of a word only in the form, he says, would subject us to the same evil." To evince this, he supposes "a Secretary of State was to grant a *particular* warrant, describing the person, for the seizing the papers; and a *general* warrant for apprehending the authors, printers and publishers:" and, thereupon says, "he should be glad to know whether either of these warrants would fall under this resolution;" and then, taking advantage of the ground he has got, rises in his demands, and ventures to ask, "Whether, if the words, treasonable practices were inserted (and endeavouring to excite to treason, he should suspect to be a treasonable practice) a General Warrant might not, in that case, pass uncensured, including both the persons and papers?" Now, I will fairly tell him my thoughts of the matter, and the probable consequence had such a resolution as that contended for been come to.

I take it to be most clear, as the law now stands, a General Warrant is good in no case whatever, for the apprehension of persons or papers, or both; and that a Particular, or any Warrant, for seizing the papers, is likewise, as the law now stands, good in no case whatever: and consequently, that none of all his ingenious contrivances before stated, for eluding the law, would be, if attempted, worth one single straw. Having laid this down, I shall proceed to say, that, in my poor opinion, if the resolution had been agreed to, as it arose out of a particular case complained of, it would have looked to the world as if either House of Parliament, whenever in any particular instance this great privilege of a freeman, the liberty of his person were violated in the person of one of their own members, and came to their knowledge, they would take immediate notice of it on purpose to express their indignation against the outrage, in order to deter all men from doing the like for the future, and to keep fresh, in every body's mind, the law upon that head. Their declaration in this case, where no doubt of the law itself could be pretended, would have convinced all mankind that, where ever the law was clear, they would not suffer it to be violated by any person, ever so high, or ever so great, without their immediate inquiry, and the fixing of an indelible brand for

so dangerous an offence. One may say of such a resolution, *traheret in exemplum*. Posterity would have seen in the journals, by the very case before the House, that the resolution was adapted to it, neither falling short of, nor going beyond it; and, from thence too would all men judge how unadvisable it must be for any man, at any time, or under any pretences, to infringe the liberty of the subject in any one point. *Ex pede Herculem*. From this instance they would naturally reason to others. Therefore, hardy as the Attorney is, I believe that, after such a resolution, he would not venture, on any quirk grounded in the change of a word, to have attempted aught against the spirits or words of the resolution, by the seizure of any Member, or indeed, of any man; or, if he did, that the vengeance of the House, which he had so trifled with, would have swiftly pursued, overtaken and punished him. His chicanery upon their expressions, would not, I fancy, prevent them from offering him up as a sacrifice to the injured manes of the constitution. The Commons of England would not, in a great constitutional point, between Ministers of the Crown and Representatives of the People, endure that kind of quibbling which is tolerated between mere private parties in disputes of *meum & tuum*, in ordinary causes, in courts below.

The Attorney, indeed, soon after advances a very comfortable piece of news, which is, that "the question of the legality of the warrant in question has been actually decided in a court of judicature." I hope he is right in his information, and am very glad to hear it, but cannot help saying, that I never have heard so much before; altho' I think somebody did once tell me that in a *trial at nisi prius*, where this and another point were in question, the Chief Justice of the Common Pleas did deliver his own sentiments about the warrant itself. But this cannot possibly be what the Attorney alludes to, as it was only the *dictum* of one Judge at *nisi prius*, where this too was not the only point, but mingled in fact with others; which therefore is nothing, cannot hereafter be cited in argument as an adjudged case, and by no means comes up to an *actual decision of a court of judicature*; as That always implies, that the point of law was solemnly argued upon a stated question, before one of the supreme courts of law, that is, a bench of Judges, and by them deliberately determined and adjudged. Nothing less than this is a solemn decision at law, and nothing less will, I presume, satisfy mankind in a point of such universal moment, so variously treated by different party-writers.

As

As to the allegation of its being "in the power of any one of the parties acting *under* that warrant, to have brought it into issue at his option;" what is that to the party injured and acted *upon*, if *he* had it not in his power to have done so?

But without entering into all the obliquities of chicane, which may be practised to delay for two years together, if not entirely to prevent, any determination; there are many people who will never believe, that for such a reason alone, any House of Commons, in an essential point of liberty, touching one of their own members, would wait, especially in a clear case where the law was not doubtful, to see what might or might not be done in any inferior court, but would immediately come to a strong resolution in behalf of the subject at large, that should in their printed votes pervade the whole kingdom, as a lasting memento to every minister of the crown, that this was so tender a point they would not let any man's mind remain unsatisfied about it one single moment; and not leave any country gentleman or other unlearned men, in a future case of a like sort, to send for information therein to some neighbouring practitioner of the law, before he could tell what to do in the matter.

Where the birthright and immemorial franchise of the subject has been broken, why should not the Commons, when assembled, come to a thundering resolution thereupon; after a complaint made to them, the fact apparent, the law certain; why should not a declaratory, indignant resolution be passed? Would it not have been constitutional? Would it not have been satisfactory? When it was directly advanced, that it would be an insult on the understanding of mankind, to pretend that the usage of a political office could overturn or suspend the law of the land; did any one man attempt to gainsay or contradict the position? And if, as the Attorney has advanced, a recent determination at law by any Judge had been upon the point; is it not an additional reason for the House not hesitating about a damnatory resolution? Or, if as was before urged, perhaps a little inconsistently, by the same gentleman, the point by some means or other, was still hanging undecided in the courts below; was it not so much the more necessary for the Parliament to prevent any suspense thereby in ignorant people's minds, about their clear birthright? Nay, as every body knows that the present House of Commons is independent, whatever others may have been; will not the reception, the discussion by the longest debate in the
jour-

journals of Parliament, and the subsequent suspense and indecision of the point, make men who had no doubt before, begin to doubt a little now? What should make a free, constitutional and independent part of the legislature, when appealed to by one of its own members, (I may say fled to, as an asylum from the violence of those pretending the authority of the crown,) refuse to come to a decisive resolution in favour of their own and every other Englishman's boasted inheritance? May not this create a doubt in many a sensible man's mind where there was none before? If the times had been arbitrary, men might have thought the crown perhaps had interposed, and that the Commons were therefore afraid to persist in the assertion even of their known rights. But there not being the least ground now for such a surmise, it will make many men at a loss how to account for the Parliament's taking up the matter, considering it, and then coming to no resolution at all, but adjourning it *sine die*. The point was so great, that never were the eyes of mankind more fixed upon their representatives. Indeed, I never saw more stir in the House itself, every body pressing his friend to stay and vote; the Secretaries of the Treasury, and other men of consequence, were remarkably active; and every thing wore the face of a decisive day. Why, after all, no resolution was come to, I never could learn. The ministers it seems, were all heartily against it, but their reasons have not transpired. I dare say, they were good, and therefore wish to know them. I am sure what has been urged without doors has not the least semblance of reason or constitution. Indeed, in all my reading of past times, I have never met with any like it. On such points, the Commons ever used to proceed to a strong resolution. I profess therefore, I long to know the true grounds for this extraordinary event. Nothing but a conviction of its being improper to declare the law at this time, could make the ministry so strenuous in a matter, that people without doors think the ministers might and ought to have pressed themselves. What therefore influenced them on that day, I cannot guess, unless it be what I dare not name. The common report is, that they carried their point, in coming to no resolution, but by fourteen; that during the debate, they were apprehensive the majority would be against them; that many of their very best friends voted, and some even spoke against them; that some sons left their fathers, and others with difficulty went out of town; that many members, who had not attended the whole session before, came down, some from sick-beds, others from foreign

foreign parts; and yet, after all, altho' the House sat two days on the matter, the first day from three in the afternoon through the whole night, till near seven the next morning, and the other day till half an hour after five in the morning, the deciding reasons against coming to the resolution proposed, prevailed only by a majority of fourteen. The crowd and agitation of people about the House, during the whole night, was inexpressible; substantial old citizens, who could not sleep from concern, stopped members as they passed in their chairs, to know the event; in short, the face of mankind could not shew more distress, if the constitution had been actually giving up to a Stuart, in one of its most essential and vital parts, by a Tory and passively obedient parliament. And why all this? I am curious to know; I must again from my heart declare, and I conjure, therefore, those who do know, to give the public their reasons for the same.

What "necessity of peculiar circumstances" the Attorney may think there should be "absolutely to require their interposition," I know not; but I should imagine these few circumstances would be fully sufficient; namely, that the act complained of was committed in time of public tranquillity, without a colour of law, by a King's minister, upon one of the representatives of the people, in a free country, on a charge of the most disputable of all crimes, which is at most but a misdemeanor; when too, however apparently libellous the words might seem without doors, *perhaps* (to borrow a common word with the Attorney) no man would say, they would have been deemed libellous, had they been uttered by any Member in his place within doors, since the memorable case of The Five Members.

Moreover, to return to the resolution proposed, where a practice has obtained in a high office, which is clearly contrary to law, and it is a matter that nearly affects the personal privilege of every freeman, it seems to me that the very thing which a House of Commons would naturally do, is, to come to a resolution damning that practice, and to go no farther; for to bring in a bill upon the occasion, would look as if a new law was necessary, because prior to that the practice had been esteemed legal, or at least very dubious. The bringing in a bill, therefore, would be countenancing in some measure what had been done, and look like a new regulation setting a-foot. Besides, an act of parliament newly made, is not so vener-

able in the eyes of the world, or so secure against future amendments and alterations, as the Old Common Law of the Land, which has continued for ages, and been from time immemorial the birth-right and inheritance of every Englishman, and is, on account of its antiquity, held, as it were, sacred in every man's mind.

If a matter of constitutional concern and alarm be stirred in the House, and the Members do not seem clear about the law, it is natural and usual for the House to go into, or appoint a Committee, for the purpose of looking into precedents, to see how the House has acted on similar occasions formerly, and what the constitution is; but, when the matter moved is so clear upon the first debate, at the very first blush, that nobody has any doubts about it, one cannot readily frame to one's mind any reasons against coming to a resolution at once that may satisfy the Public. To call for cases of this having been done is unnecessary, because the nature of the thing shews it is right. Some things are so plain of themselves that no case can make them plainer. Who thinks of defining simple original ideas, or of elucidating first principles? This power of interposition in the Commons flows of necessity from the nature of the government; they could not be the grand inquest of the nation, the great counsel of the realm, sponsors for the republic, or guardians of the rights of the people, without possessing it. To suppose that they have the power of inquiring, and that it should be proper for them so to do, and yet not come to any result or resolution, in consequence of such their inquiry, seems to be absurd and past understanding; and, where a matter is among the first principles of the constitution, it is in vain to be looking for instances or cases to prove it, nay, such a proceeding would be weakening its majesty and authority; for, it looks as if this right could not be put in use, unless some instances of its having been exerted were produced to warrant the exercise of it. But, indeed, there is another reason why examples need not be cited, which is, that they are so numerous, in all uneasy periods of government, that no man can read through the times of the four Stuarts, to the reign of William the Third, without finding the journals of Parliament full of them.

As to the four instances quoted and ridiculed by the Attorney, it seems to me that they directly apply to the main point and hinge of the dispute, that is, to the practice

tice in Parliament of interfering by resolution in matters of law; nay, they go still farther in point, for they prove that the House has interfered by resolution in matters of law, where precedents and practice were cited, and admitted, in support of the malefactor; and that this had been done not only in cases of public concern, but even in a private case, where the illegal warrant itself had been issued at the desire of a father against one of his own children, upon a mere family motive. In this last case, nevertheless, the Members reasoned very naturally to the possible consequences, if it was suffered to pass uncensured. The simple fact was this, Lord Darby fitted out a small vessel with arms, unknown to his father the Marquis of Carmarthen, Lord President of the Council, who acquainted Lord Nottingham, the Secretary of State, with it, who had not time to put this information into writing, nor was it upon oath, but he wrote it upon memory, for his own satisfaction. Lord Darby is taken up, and says “ the vessel was his own, and fitted with the arms it had before to make use of for his diversion; ” which the Secretary found so ingenuous an answer that he released his Lordship without bail, upon his promise on his word and honour to appear upon summons. Some of the Members, however, said, “ This proceeding sticks not only on the people, but their Representatives may be in danger. If, by intreaty, a man may be taken up in this manner, every mother’s son may be taken up. Natural affections must not be used to try tricks with the government. Lord Nottingham granted the warrant without oath.” Howard says “ It will justify Lord Nottingham, because he had his information from a Privy-Counsellor. I would be satisfied whether a Privy-Counsellor must not give information upon oath, as well as another? If this warrant was granted as a Privy-Counsellor, or a Justice of Peace, I know no law for it; for, if six Privy-Counsellors do it, and here is but one, it is worthy your consideration. If, as a Justice of Peace, he cannot take up a man without oath. If one Counsellor shall whisper to another, and imprison a man, I know not who can be safe. If we take up this now, at the rate elections go at, and the determination in Sir Samuel Bernardiston’s case, they may have a Parliament as they please. I know not but that it may be in the power of one great man to make a Parliament. I hope the House will be jealous of their right.

“ I should be loth to go without this being decided
 “ there would be no safety for me when I am at home.
 “ If this be done to one, it may to another. In two
 “ months this man may go round the House thus. I
 “ hope, as *Englishmen*, we shall not forget our rights;
 “ and any man that will do this, is not fit to be employ-
 “ ed in the government. I would not have it go off that
 “ he can warrant the thing. Prosecution of a writ will
 “ hinder a member from his attendance. He said, “ the
 “ warrant is for treasonable practices,” which is bailable.
 “ I hear it moved to refer it to the Committee of Privi-
 “ leges to inquire into it; but I think that not fit. From
 “ whom will you have informations? Will you send
 “ for Lords Nottingham and Carmarthen? I would
 “ have a good correspondence with the Lords: the Peers
 “ will not come to you, and there will be a rupture.
 “ But if you will come up to the motion, for your hon-
 “ our and ease, vote the Breach of Privilege, and then
 “ address the King to take order that the like be not done
 “ for the future. Granting the Warrant is a thing that
 “ must not be passed by so hastily. You will find few
 “ messengers that will deny such execution of a Warrant.
 “ The Messenger (says the Speaker) undoubtedly breaks
 “ your privilege, as well as the Bailiff that arrests your
 “ Member. The Bailiff and he that sues out the writ
 “ against a member (adds Mr. Hawles) are upon record;
 “ and if you only call upon the person who does officiate,
 “ your privilege will be quickly lost. Whoever issues out
 “ the warrant, is more, or equally, guilty than he that exe-
 “ cutes it, (says old Sir John Maynard.) As this case
 “ stands, a member is imprisoned, and a warrant is made
 “ to take him for *treasonable practices*; if we take notice
 “ of it, and let a member sit among us so accused, we
 “ cannot well answer it. We are to vote it a breach of
 “ privilege, and then inquire what those treasonable prac-
 “ tices are. At this rate we may be all imprisoned, and
 “ whipped to our lives end. Vote it a breach of privi-
 “ lege, and sit not mute upon so plain a breach. (To
 “ which Sir John Thompson subjoins.) He that touches
 “ the parliament, touches the vital part of the nation.
 “ The fault is the greater; for the man is not fit to be
 “ Secretary that carries about him the legislative autho-
 “ rity to commit in this manner. The Messenger had
 “ been clapped up, if he had not done it. Put the ques-
 “ tion thus; “ That granting the warrant without no-
 “ tice,

“ tice, &c.” was a breach of privilege, &c.” The House then resolved, That the granting a warrant to arrest the Earl of Danby, a member of this House, and the taking him into custody by virtue of that warrant, is a breach of privilege of this house.”

The four cases are perfectly apposite to the great question of parliaments interposing by resolution, where the known law has been broken by the hand of power. And, I should think too, that if a case consists of four points, and a precedent can be found for each point, That case would be fully proved by those four precedents; according to my notion of logic. At least, a man who denies the reasoning on this head, has no right to accuse his antagonist of “unfairness and quibbling,” as the Attorney does throughout; and, from what I see of his performance, should therefore imagine he could only do so in order to forestall the charge, and to prevent its being applied to himself. And so far from being angry, as he is, with two of these cases for being applicable to a Chief Justice of the *King's Bench*, I like them the better for it, and wish, that whenever a Chief is found to be clandestinely meddling in matters of state, in perversion of the law, he may be dragged into broad daylight by the great inquest of the Nation, and his name and memory be branded for ever, to the latest posterity. I cannot, indeed, figure to myself a meaner or more pernicious person than a Chief Justice, with a great income for life, given him by the public, in order to render him independent, privately listening to every inclination of every ministry, and warping and wire-drawing the plain letter of the law, in order to accommodate it to their inclinations, instead of pursuing the course of established precedents, inviolably, intrepidly, and openly, without regard to party or person. The chapter of expediency is the very worst source of adjudication, inasmuch as it tends to the setting afloat, by degrees, the whole law of the realm. “To allow of any man's discretion (says Lord Coke) that sits in the seat of justice, would bring forth a monstrous confusion.” In short, no greater public misfortune can befall any state, than to have such a person preside in one of its supreme courts of law. It is, indeed, wonderful that any man should have so servile a disposition; for, let his abilities be what they will, he will always be regarded as a contemptible personage. This sort of profligate magistrate may be sure of being used by every ministry, but of being esteem-

ed by none, seeing no set of men can depend upon him any longer than they remain in office and power; his only principle of action being an implicit obedience to the old tutelar Saint at St. James's. He must be, in truth,

A tim'rous foe, and a suspicious friend,
Dreading e'en fools.

Having before declared my own opinion, that an inquiry after cases, to justify the House of Commons, in coming to resolutions upon matters of law; which touch the constitution itself, was wholly unnecessary; and it being also tedious to transcribe all the numerous instances to be met with in the parliamentary proceedings, proving the exertion of this right, I shall not increase the number; but, since these two examples of their declaring the law, even in opposition to the practice and decisions of Chief Justices, have been mentioned, I cannot forbear noticing two or three circumstances in their cases, which tally most surprisngly with some of the doctrine I have advanced; and with the cause that gave occasion to it. The committee reported, among other things, with respect to L. C. J. *Keeling*, that, "in an indictment for murder, " which the Jury found manslaughter, because they found " no malice prepenle; he told them they must be ruled " by him in matter of law, and forced them to find the " bill, Murder. The man was executed accordingly, " without reprieve, notwithstanding the address of the " Gentlemen of the Bench to him. That he forbid a " Habeas Corpus, and a Pluries to be issued out; so that " the party was obliged to petition the King." Upon these informations being proved, they resolved, " That " he vilified Magna Charta; That his proceedings were " arbitrary and illegal, to the danger of the lives and " liberties of the people, and tending to introduce an " arbitrary government in judicature in their place." As to L. C. J. *Scroggs*, there was a great complaint against him, for his treatment and discharge of a *Middlesex* Grand Jury, before they had presented all their bills, for arbitrary proceedings in cases of libel, and other matters, and for issuing of illegal General Warrants for persons and papers. The law-members in the House urged that, "if a Grand " jury be discharged whilst indictments are depending, " there could be no proceedings of justice: that no man " could want intelligence of a presentment being against " him, nor a friend upon the jury to observe the witnesses " and

“ and the opinion of the jury; and if Judges could dis-
 “ charge a Jury before they had brought in their pre-
 “ sentments, a man could never be presented, nor any
 “ law take place. The Jury was likewise blamed by the
 “ Chief Justice and told, *that they meddled with matters*
 “ *which concerned them not*; and when the clerk of the
 “ Court, upon their discharge, said, *Hold, they have more*
 “ *Presentments upon the file*, the Chief replied, *Will you*
 “ *give a rule to the court?* In former times, Judges had
 “ one rule of Justice to go by, and another of Policy,
 “ and if Judges once undertake *that*, there is an end of
 “ all law. Shall we have law when they please to let
 “ us, and when they do not please, shall we have none?
 “ It is assuming a legislative power; by which a Judge
 “ makes his will a law. *Do as you have done already in*
 “ *this parliament, make a vote upon them*. If you do not
 “ deeply resent this, all your laws will signify nothing
 “ to posterity; for all is at stake, if men take upon them
 “ to proceed so arbitrarily, and are so servile, as to violate
 “ laws for self-ends. I will not define the offence, but,
 “ I think these proceedings do subvert the fundamental
 “ laws, and so I would go to the utmost severity of Judg-
 “ ment. The first violation of Magna Charta, was from
 “ the two Chief Justices *Tresilian and Belknap*, and these
 “ Judges have now taken upon them to subvert the rights
 “ and privileges of the subject. *My opinion is to make*
 “ *the question before the House general*. In Scotland
 “ they have what laws their governors please to impose
 “ upon them; let us take care that our condition be not
 “ brought to that. I would gladly know what way there
 “ is to bring a great criminal to punishment but in parlia-
 “ ment (and we have little hopes there, by what I have
 “ seen) if ever you admit Judges to let juries, or not,
 “ inquire into offences as they please. I think, I can
 “ remember a precedent, when the Judges took upon
 “ them to violate the laws, and so did violate the King’s
 “ oath and their own, and were hanged for their pains,
 “ and I shall make no great scruple to do it again. Print-
 “ ing I take now to be free. A subject hath by law,
 “ liberty to write, speak or print; he may be indicted, if
 “ he transgress, and it is at his peril, if he offends. Shall
 “ not a man speak, unless he be licensed. The court of
 “ *King’s Bench*, was at Scroggs’s direction. But, if
 “ Judges can be found to make new laws by their inter-
 “ pretation of the old ones, and if Treasurers can be
 “ found,

“ found, &c.” “ A Committee was appointed to examine
 “ the proceedings of the Judges in Westminster-Hall, and
 “ to report the same, with their opinions therein, to the
 “ House.” Upon the report of the committee, “ the
 “ House resolved *nemine contradicente*, That the discharg-
 “ ing of the Grand Jury by the Court of King’s Bench,
 “ before the last day of the term, and before they had
 “ finished their presentments, was arbitrary and illegal,
 “ destructive of public justice, a manifest violation of
 “ the oaths of the Judges of that Court, and a means to
 “ subvert the fundamental laws of this kingdom: That
 “ it is the opinion of this house, that the Rule made by
 “ the Court of King’s Bench against printing of a book
 “ called, *The weekly packet of advice from Rome*, is
 “ illegal and arbitrary, thereby usurping to themselves
 “ legislative power: That the Court of King’s Bench in
 “ the imposition of fines on offenders of late years, have
 “ acted arbitrarily, illegally and partially: That the
 “ refusing sufficient bail in these cases, wherein the persons
 “ committed were bailable by law, was illegal and a high
 “ breach of the liberties of the subject; and That the
 “ warrants * issued by the King’s Bench are arbitrary
 “ and

* “ Angl. ff. Whereas there are divers ill-disposed persons,
 “ who do daily print and publish many seditious and treasonable
 “ books and pamphlets, endeavouring thereby, to dispose the
 “ minds of his Majesty’s subjects to sedition and rebellion: And
 “ also infamous libels, reflecting upon particular persons, to the
 “ great scandal of his Majesty’s government. For suppressing
 “ whereof, his Majesty has lately issued his royal proclamation:
 “ And, for the more speedy suppressing the said seditious books,
 “ libels and pamphlets, and to the end that the Authors and
 “ Publishers thereof, may be brought to their punishment:

“ These are to will and require you, and in his Majesty’s
 “ name to charge, and command you, and every of you, up-
 “ on sight hereof, to be aiding and assisting to Robert Stephens,
 “ messenger of the press, in the seizing on all such books and
 “ pamphlets as aforesaid, as he shall be informed of, in any
 “ bookfellers or printers shops or warehouses, or elsewhere what-
 “ soever, to the end they may be disposed as to Law shall ap-
 “ pertain. Also, if you shall be informed of the authors, prin-
 “ ters, or publishers of such books or pamphlets, as are above
 “ mentioned; you are to apprehend them, and have them be-
 “ fore one of his Majesty’s Justices of the peace, to be proceed-
 “ ed against according to law. Dated this 29th of November,
 “ 1679.

To

“ and illegal. And it was ordered, That the said report, “ and the several resolutions of the house thereupon, be “ printed; and that Mr. Speaker take care in the printing “ thereof apart from this day’s other votes.” Thus did the Commons behave in the case of two Chief Justices of the *King’s-Bench*, and their conduct is so decisive upon the point we now are, that no words can add to the force of it. But there was another thing, which was done in the same session, that I cannot help relating. The under-secretary of state, by direction of Sir Lionel Jenkins, Secretary of State, who had received a verbal order from the Clerk of the Council for the purpose, writes a letter to a gentleman at Dover, desiring him to wait upon the Mayor, and direct him to seize a Man, if he should land there, together with his companions, and detain them until further directions; and in this Letter there is inclosed a particular description of the Man and his name, said

To Robert Stephens, messenger of the Press; and to all mayors, sheriffs, bailiffs, constables, and all other officers and ministers whom these may concern.

W. Scroggs.

“ Angl. ff. Whereas the King’s Majesty has lately issued “ out his proclamation, for suppressing the printing and publishing unlicensed news, books and pamphlets of news; “ notwithstanding which, there are divers persons who do “ daily print and publish such unlicensed books and pamphlets.

“ These, are therefore to will and require you, and in his “ Majesty’s name to charge and command you, and every of “ you, from time to time, and at all times so often as you “ shall be thereunto required, to be aiding and assisting to Robert Stephens, messenger of the press, in the seizing of all “ such books and pamphlets as aforesaid, as he shall be informed of in any bookseller’s shop, or printer’s shop or warehouse, or elsewhere whatsoever, to the end they may be disposed of, as to law shall appertain. Likewise, if you shall “ be informed of the authors, printers or publishers of such “ books and pamphlets, you are to apprehend them, and have “ them before me, or one of his Majesty’s justices of the peace, “ to be proceeded against as to law shall appertain. Dated this “ 28th day of May, Anno Dom. 1680.

“ To all mayors, sheriffs, bailiffs, constables, and all other “ officers and ministers, whom these may concern.”

W. Scroggs.

“ To Robert Stephens, messenger of the press.”

said to be Norris or Morris.* The information upon which this letter or order proceeded, was not upon oath. However, when Norris landed, he is taken and carried before the Mayor, who thought it reasonable to commit him to the common Prison, and to seize his papers. When that was done and known, there were two orders of council to the Mayor

* The letter was as follows :

“ S I R,

“ Whitehall, May 31, 1680.

“ The Right honourable Mr. Secretary Jenkins being hastily called this day to wait upon his Majesty at Windsor, has commanded me to send you the inclosed description of a person, who, if he shall happen to come from France, and land at your port, Mr. Secretary says, you will do the King and Kingdom a great service, if you will keep a strict eye upon him and the company that shall arrive with him, till they be all brought before Mr. Mayor, or other chief magistrate of your town, whom Mr. Secretary desires to offer the said persons the oaths of allegiance and supremacy ; and, in case of their or any of their refusal of the same, to secure them and deal with them according to law ; giving Mr. Secretary an account, with what speed may be, of all the proceedings in this affair. If such a person as is here described should come, and make no bones of taking the aforesaid oaths, yet, in case Mr. Mayor, or other chief magistrate before whom they are brought, shall have reasonable ground to suspect that he is the man so described, and that he has one or more in his company, who may be reasonably suspected to be Priests, some handsome course is to be taken to detain them, till Mr. Secretary can be acquainted with what is done, and send such farther directions as shall be thought necessary. Mr. Mayor's authority, with your prudence and zeal in this matter, will, I hope, produce a good effect upon this command.

I am, S I R,

“ Your very humble Servant,

“ *John Cooke.*”

The paper inclosed was, “ *Peter Norris*, some call him *Morris*, a *Scotchman*, handsome neat face, sanguine complexion, short nose, bald pated, white wig, slender body, little stature, civil and smooth in his discourse, speaking *French*, aged 34 years, more or less, taylor by trade.” And under this description, written with another hand and ink, these words, “ went into *France* on *Wednesday* was three weeks, to bring with him a Priest. Delivered to Secretary Jenkins, May 29, 1680.”

Mayor to stop and deliver him to a Messenger, who is sent down on purpose to bring him before the council, in custody ; and the papers are ordered to be lodged in the council chest. Norris, after being examined, was dismissed, and it was declared there was no farther cause of detaining him ; and the verbal order first mentioned was never entered in the minute-book of the council. Upon this case, a complaint is made to the House of Commons, who immediately appoint a committee to inquire into and report the matter to the House, which is done accordingly. The members enter warmly into the grievance, and some of them say, “ I would know how the privy council came
 “ to have a description of this man. It may be, the
 “ French Ambassador has had some influence in councils.
 “ I do not know what stopping a man on the way or
 “ road is, to be immediately sent up to the Council by a
 “ Mayor or officer, upon verbal order. I know nothing
 “ of a verbal order of council ! *In cases of necessity to com-*
 “ *mit illegal actions*——these are strange assertions for
 “ what has been done or what may be done. The
 “ Thing is all of a piece, for some great persons are con-
 “ cerned in it. Let Gentlemen make it their own case.
 “ I see not who is to blame, but he that signs the war-
 “ rant ; nothing appears to you else ; therefore put a
 “ brand upon it. A parcel of men there is, who
 “ abuse the King, and still you must be tender of
 “ them, and these men must still be about the King.”
 Thereupon, Sir Lionel Jenkins very honourably took on himself the letter written by his under-secretary, and said, in excuse of himself, that he was but ministerial in the affair, owned he had the information from a man who had it from another, and that he related it to the council as he thought it his duty ; that he had thereupon a verbal order to seize the person informed of, and, in consequence of that, gave direction to his under-secretary to write the letter before-mentioned, and if any thing had been done unjustifiable, that he himself must answer it ; that he thought it was treason for a Romish priest to be upon English ground, and Felony in Norris to receive him, and that in his post he could do no other than obey his superiors : and that he humbly took leave, to aver, that a verbal order in a committee of Council, is what is not entered into the minutes of the Council. The House desired Sir Lionel to withdraw, which he accordingly did, and then they

they resolved, " That the late imprisonment of Peter Norris at Dover, was illegal ; and that the proceeding " of Sir Lionel Jenkins, Knight, one of the principal " Secretaries of state, by describing the person of the said " Norris, and directing such his imprisonment, was illegal " and arbitrary ;" and they made an order for printing the case of Peter Norris at large, which was likewise done. Now, here the Commons, without any communication with the Lords, resolved a point of law, altho' Norris *might have brought an action* of false imprisonment, had the opinion of a court of law, and recovered *damages* for a satisfaction of his injury ; and he was no member of their house. This resolution too was not made as a foundation for any future bill, nor for articles of impeachment, but merely to damn an illegal and grievous warrant.

Such hath been the conduct and interposition of the Commons under the house of Stuart, both father and son, with respect to the law of this kingdom, when invaded by great officers of state ; and, yet these were princes who claimed a right of governing the kingdom, paramount the laws, *jure divino*, whereas it is the honour of his present Majesty's family to derive their sole title from the choice of the people, from an *English* act of Parliament. There is not, therefore, the least divinity that can now be possibly imparted from the throne to any of the present ministry ; they are mere men and creatures of civil polity, and their actions may be judged by the common law of the land, without either blasphemy or any extraordinary or occasional statute for the purpose.

This being so, I am amazed that the Attorney should think a bill necessary ; because, if there be no law now existing, that authorizes general Warrants in any case whatever, it really seems to be ridiculous to bring in a bill " to regulate what does not exist ;" an argument, I find, which he affects not to comprehend, merely because he is unable to answer it. " The Evil" is the practice or usage which has grown of late, within the time of our fathers, in a clandestine office, contrary to the fundamental law of the land ; and when this practice has been examined and detected (or " probed," if he will) the Parliament need only damn it, and leave the law as it was, and is, and will I hope ever be, without " the alteration even of an " iota in matter or form," in short without any tinkering
" or

or repairing, nay, without any refining whatsoever. The Attorney, by an act of parliament, would, I perceive, fain make law of this modern usage, under a pretence of bettering thereby the old common law ; but, I fancy, he will find most people of opinion against him, and as much afraid of his coarse hand as of his superiors refining instruments, and therefore, beg to have the law remain as it is. No act could possibly answer the end of a resolution, unless it were, perhaps, a short declaratory statute of three lines, reciting that, ‘ Whereas a novel practice, “ had of late years gained footing in several ministerial “ offices, whereby General Warrants, for the apprehension of persons under a general description, without “ naming any in certain, had been issued from such offices contrary to *Magna Charta* so repeatedly confirmed, “ and to the immemorial and established rights of every “ Free-man, and to the known laws of the realm ; “ Therefore, by the direction and consent of King, “ Lords and Commons, be it declared, That such practice is in all cases illegal, repugnant to the fundamental “ principles of the constitution, dangerous to the liberties of the subject, and absolutely unwarrantable.”

Old Sir Edward Coke said, with some humour, in Charles the first’s reign, at the head of the Commons in their conference with the Lords——“ For a freeman “ to be tenant at will of his liberty ! I will never agree “ to it : it is a tenure not to be found in all *Littleton*.” “ It “ is (as he says, in one of his treatises) a great deal better for “ the state, that a particular offender should go unpunished, “ on the one hand, or that a private person,” or public minister, “ should be damnified on the other by the rigor of “ the law, than that a general rule of law should be broken to the general trouble and prejudice of many.” Therefore, I beg leave to enter my protest against any bill to regulate what I hope will never exist. The ancient Britons in a body told Augustine himself, *se non posse absq; suorum consensu & licentia priscis abdicare Moribus*. And, as to his present Majesty, one may say, in the words of the famous Serjeant Glanville, (since I am in the humour of quoting) “ there is no fear of trusting him with “ any thing, but ill counsel against the subject ;” for, when once he is truly informed what his people’s *prisci mores* or Common Law is, he will never countenance any officer in abdicating them *absq; consensu et licentia suorum*. I can assure the Attorney, that I have, according to his directions,

directions, " seriously attended to his arguments," and the result has been what he now sees. However, upon a close attention to his manner of writing upon the subject, I am convinced, that we do not differ very widely in reality upon any of the great points. For in my conscience, he is of opinion with me and all the rest of the lawyers, That,

Every General Warrant is bad.

The Ministry nevertheless, I should imagine, will not be well pleased with him, for having insinuated arguments to the contrary, which may convey an idea to an incautious reader, of their being in an opposite opinion; whereas, I am thoroughly convinced they concur intirely with the rest of the world in the two propositions last stated. I very much doubt too, whether they will pardon him for obtruding his private reasons as those which weighed with them, to put off the dermination of the question. Indeed, if any of the arguments he has adduced on this head, were really of weight with them, I should think it must be that which he grounds on the impracticability of *pleading* with effect such a resolution in any of the courts of judicature; for I sincerely esteem this to be by far the most satisfactory of all his arguments in this matter. I know, that my Lord Coke does say very emphatically, that *the science of beau pleader is the very heart-string of the Law*. It would therefore, I confess, be a lamentable thing to have the Crown-pleaders "*divided and confounded*" in this their nice and artificial department of the law. Considering the present knotty difficulties attending these gentlemen, to throw any additional rub or stumbling block in their way, would be unpardonable in any good-humoured administration. I do not, however, pretend to form any determinate judgment of the ministry's reasons for avoiding a resolution, as I have not vanity enough to suppose I can fathom them. *Perhaps*, (to use a favourite word with the Attorney in this kind of argument) they might be somewhat pressed in time, having other weighty affairs in hand, that the vulgar know nothing of, and therefore would not come to any decision of the point, seeing they could not give it the most parade of a solemn discussion upon the report of a committee (altho' they were clear in the law themselves); or, they might oppose the resolution, because it was moved

moved by the opposition, resolving withall to resume it themselves the very next session, which last, indeed, I am very apt to think *may* be the case; or, peradventure, there might be other less ostensible and more powerful and predominant reasons for their having so notoriously exerted the utmost of their strength, merely to avoid the coming to any resolution at all. They said nothing inconsistent with any conduct; and, as many of their best friends voted against them, it cannot be supposed they would run so much risk as they evidently did, without some very extraordinary reasons for so doing. Nobody can imagine they would chuse to stand so much fire, for the mere satisfaction of shewing they were proof against every thing. It would not, however, be disagreeable to the Public, to know from the pen of a minister, especially, from one of them that declines no labour, and has been a practising lawyer himself, what really were the arguments that swayed him to be for an absolute adjournment of this question, when so many people were of opinion it would have been more for his interest to have taken the popular side and agreed to the resolution, if not as first moved, at least, as finally amended, narrowed and particularized by his learned co-adjutors. Such information would be much more acceptable than the little scraps of politics and intelligence, which one now and then finds in the *Daily Gazetteer*, and which the common reader, upon the very first view, attributes to Jemmy Twitcher, (or his second Dr. Shebbeare,) who, I presume, is not of the House of Commons, and is perhaps some man that is too much acquainted with law, and of too little gravity to be equal to such a performance, and therefore, contents himself with doing business in another way, and only now and then writes off a little squib, *upon his knee*, for one of the daily papers, as any matter happens to strike him, at home, in the coffee-house, or at the tavern; in company with his wife and family, his mistress and girls of the town, with ministers of state, or gentlemen of fun. Altho', I know it is the opinion of some people, that any thing will do for the Public (poor John Trot.)

The Attorney seems to think, he has so sufficiently defended the Majority, that he may swagger a little, and therefore asks, Is this all that you have to complain of? I really thought you could have made out a more moving tale; What is capable of moving him, I know not; but

I can

I can assure him, that people in general, think the plain story so bad, that it is not well capable of being exceeded: and, all that he has convinced me of is, that there is nothing so bad, but some man or other, for the present penny, may be found hardy enough to undertake either the execution or the defence of. When I hear a man call an actual arrest of a member of parliament, or the mere charge of a libel *ex officio*, and the seizure of his papers, "a phantom of imagination"; and remember to have heard the same man declare at his outset upon this question to a very great assembly, "that he had long been a Member of it, but had rarely attended, because he did not think it worth his while before, having more valuable business elsewhere;" and recollect scarcely ever to have seen him in that assembly, or at least to take any part in it, except when the confirmation of "another pillar of the constitution" "the Habeas Corpus law," was in agitation, by virtue of a *bill* too (the mode that he now seems fond of) and that he then gave an earnest of his patriotism by being the champion of the opposition to it, inasmuch, that he roused the indignation of the Great Man of the age (then a minister) who could not forbear starting up and reading to him, upon the spot, the resolutions of the ever-memorable parliament of Charles the 1st, on behalf of the rights and liberties of Englishmen, being therein supported with great eloquence and strength of argument by the then Attorney General, another great lawyer, and a particular friend of this last gentleman's having indeed been the occasion of the Bill: when all this, I say, presents itself to my mind, I confess, I want nothing more for forming a decisive opinion of the Attorney as a public man, without descending at all into his private character or practice, his method of earning, or his measure in the taking of fees, or any such other petty, trivial, personal matters, that, be the truth what it will, are not worth enquiring after, as they no way relate to the community, in any respect. By calling him the Champion, I do not mean to forget, that a certain candid lawyer united in using his best endeavours to strangle this Habeas Corpus Bill; but then, he did it in so delicate and qualified a manner, that surely he cannot expect to have *his* pass for a first-rate part upon the occasion; no more than on another, when he gave up (from complaisance, I presume) an opinion that he had drawn and signed relative to a prosecution, and submitted to

concur

concur in that of an over-bearing colleague, who, tho' a subordinate co-adjutor in rank, by the boldness of his temper, took the lead in that matter.

I cannot help here remarking, that ticklish times or political struggles, always bring to light the real abilities of men, and let one see whether a man owes his reputation and rank to family, learning, and an attention to please, or to real great parts, a sound judgment, and true noble spirit. People of the latter class, become for ever more considerable by opposition; whereas the former by degrees sink to common men in it, and should therefore never quit for one moment a court, or, if by connection and chance they are obliged so to do, should return to it again as fast as they can.

Being one of those men, who think that "The heart-blood of the commonwealth receives life from the Privilege of the House of Commons," that is, in all matters where a dispute is likely to lie between the crown and the people, I cannot help noticing any the least incident, that seems to me to break in upon it at all, and endeavouring from the conduct of men, even in such little matters, to find out a clue that may unravel their turn and disposition in concerns of much greater moment, not judging of politicians in the least, from the professions they make, but from their actions, as the sole genuine expostor of their heart. But, by privilege of parliament, I do not mean that shameful exemption from private arrests, which seems to me to operate against liberty intirely, and to render a House of Commons no other than an asylum for needy debtors; who, you may be sure, when once they are elected, like all other people in worldly distress, both will and must do any thing for ready pay; and, altho' one of this description may be ashamed to look mankind in general in the face, yet upon any call of a pushed minister, he will contrive to skulk down to the Lobby, and be sure so to dispose of himself, as to be able to come forth, whenever the division takes place, and then, perhaps, disappear till a second call of consequence shall render his appearance of some worth again. I speak alone in support of privilege, against the power of the crown. Now, I remember being in company not long ago with some lawyers, who were talking over some of the late events relative to Mr. Wilkes, and one of them was saying that there was a doubt about the proceeding in this respect, occa-

sioned by Mr. Wilkes's having a design to lay hold of the first moment for stirring a complaint of a breach of privilege in his own person, and the Chancellor of the Exchequer's having likewise a message from the King to communicate to the House concerning privilege. A great commoner immediately said, this matter can admit of no dispute, and I fancy I don't hear well; the existence of the freedom of a House of Commons depends upon privilege: a message from the King of a breach of Privilege! Strange words! it cannot be so; it may be of somewhat relating to Privilege. A Gentleman in the company thereupon bethought himself, of saying it was usual, as he recollected, in order to give a certain commencement to a session, to read a bill for the purpose; and that for this reason the Clerk always prepared one accordingly. This gave room for a complaisant lawyer immediately to throw in, that this was certainly necessary, as all acts of parliament, having no certain day named therein, were in force from the beginning of the Session, and that my Lord Coke had said so. The respect of us all for this conciliating Gentleman's opinion at that time, made us, I remember, acquiesce in what he said. However, to say the truth, I then thought it a very strange reason, and since upon inquiry find there is no foundation for it, although, I suppose, the candid gentleman really thought there was, when he said so, and that he did not drop such words in such a free company as ours, merely with an intention of having them reported to his advantage in one particular place. But, if he did, as it was a mixed company and no secrecy necessary, I have a right to tell the world the story; and yet, I wish with all my heart, that his civility may not be thrown away, nor the courtliness of his disposition long lie unheeded. As to the thing itself, it must strike any plain man that the beginning of a session becomes as certain and notorious from the King's coming to the House, sending for his Commons, and his speech, which all appear in the printed proceedings of the Commons, with the day prefixed in latin, as it is possible. This is something real; whereas the bill prepared by the clerk is nothing, for it is never passed into an act, nor heard of afterwards; and it is only made use of as a mere type or symbol, to keep alive the right which the Commons claim of going upon their own business before they go upon that which is pointed out to them by the King in his speech, having in fact generally none of their own that is
ready

ready time enough for the purpose. Now, nothing in the world could have been a stronger proof of the exercise of this right, than the giving a preference to the complaint of their own member to a message from the Crown; whereas nothing could seemingly invalidate this right more than the proceeding upon the royal matter before that of their member, and especially if there should be in fact, not only a doubt but a certainty, that his was first moved. Upon the principle that Privilege is to take place of every thing else, nothing is of so much consequence to the community, as the relief of its representatives, for an unjust violence; they cannot do their duty as a parliament without it; for the parliament cannot be full, every county, city and borough cannot have its deputy present with it; and for this reason one would imagine this should be their first business, and this being printed and appearing in the votes would render the commencement of the session as remarkable and certain as the reading of any bill whatever. With respect to my Lord Coke, I have a notion he says only, that "when a parliament is called and does not sit, "and is dissolved without any act of parliament passed or "judgment given, it is no session of parliament, but a "convention;" wherein is not one word touching the necessity of reading a bill to give a certain commencement to a session, and indeed, I think he could never say so silly a thing; for I do not see how That marks a commencement more than any motion made or resolution come to; and if the passage above quoted be what is meant, it is of a case which does not at all apply to the present question, because it supposes a case where no act at all is passed or judgment given; and no man of this side of St. George's channel thinks of inquiring after the commencement of an act that never existed, as a matter necessary for the courts of justice to know. Moreover, the title of all acts printed, expresses the time of the commencement of the session when they passed. But, I have frequently remarked, that where a desire of pleasing others, operates more strongly than the desire of doing what is right, men even of decency and circumspection will slip into strange absurdities now and then.

In short, a man may advance such a position, by way of compliment, altho' it be somewhat at the expence of his understanding or his sincerity; and it would not be worthy any serious attention, were it not a little characteristic, not only of the person, but of the times, when

such things can pass for reasons. Too much respect cannot be shewn to the Crown by any man as an individual ; but, it ill suits with the duty of representatives of the people to be swayed, by any motives of personal respect, to part with a jot of their own independency and dignity in their corporate capacity. In truth, I suppose no instance of the kind ever happened in our House of Commons, or ever will. I do not, however, mean to say, that men who advance such doctrines may not be possessed of a great deal of private merit, and be exceedingly honorable in their particular profession or calling ; nay, they may be of use about a Court by their circumspection and decency in dissuading any very foolish, very shameful, or very violent measures : but, being formed in a prerogative mould they can never be brought to act quite fairly by the people let the ground be ever so good ; for they cannot find in their hearts to speak what may be capable of the least interpretation to their disadvantage, and every now and then will drop such expressions of candor and moderation, and so qualify what they say, for the sake of being civilly reported elsewhere, that they enervate all opposition, and by their suppleness frequently lose some great point of liberty, that might otherwise be obtained for the public. Being an old fellow, and recalling to mind the other-guise spirits that struggled first for an exclusion bill, and when that proved impracticable, still went on, and, at last, brought about the glorious revolution. I fancy I hear old Britannia call out to these tame, temporising spirits, these scholars of mere worldly caution and œconomy, these Hanoverian Tories ; You do me more harm than good upon every real trial, your parts are not extraordinary, nor your learning singular, you speak long, not forcible or persuasive, and you have not a grain of true patriotic resolution : “ Law in such mouths is, in fact, like a sword in the hand of a lady, the sword *may* be there, but, when it comes to cut, it is perfectly awkward and useless,” depart in peace, leave me to myself, and, like Mr. Hyde of old, return from whence you came ; I never asked your assistance, and I had been better without it.

Non tali auxilio, nec defensoribus istis Tempus eget.

A man may, in truth, write moderately and meritoriously, in behalf of government, enforcing new laws of forfeiture on the subject, who never will, no more than
any

any of his name, summon up resolution enough to speak plainly and boldly against a court, at the hazard of all his interest in it, let liberty in general be ever so much concerned, or his own fortune be ever so great, so certain and independent.

There is of late such a lack of spirit in what are called public men, that I am persuaded there are many gentlemen who would deem Lock on government a libel, were it now published for the first time, instead of being reprinted. The Tory doctrines seem to be establishing themselves every day; and Tories spring up every hour like toadstools in the root of an old oak, that is sprinkled by accident with a little water. I remember to have heard a Scotch Lord, who piques himself too upon law, and who had a brother that was high in the profession, declare, before a great assembly, that His Majesty held his crown as free as any of his ancestors; for every body knew that the laws passed at the revolution, were the acts of heat and violence, and party, and to be regarded accordingly. Whereas, if these acts were once set aside, and those passed in consequence of them, His Majesty would have no title at all to the throne that he now fills, so much for the benefit of us all. I really shall not wonder in a little time, to hear hereditary right talked of again, and then it is but one step more to the old doctrine of *jus divinum*, and passive obedience. Now, I chuse to have his Majesty's throne remain fixed upon its only solid or durable foundation, an act of parliament; and at the same time to have law, and not the goodness of the King, for my protection. There is room enough for grace and favour afterwards. I desire to steer through the temperate and easy channel of a legal constitution, and a limited monarchy; without being demolished on one side by arbitrary prerogative, or perpetually agitated on the other by the tumult and faction of a popular and republican state. I am jealous, I confess, of all innovations, and heartily wish the present constitution may last, and that my son may be a patriot under it; without going so far as a late great financier, who is reported in his very last moments to have said, "For God's sake let my son be bred a Whig, procure him an honest, sensible, true Whig tutor, be the expence what it will: This poor country, I am afraid, will be over-run with Tories, Scotsmen, and Jacobites." Now, altho' I am persuaded, that gentlemen of the last description, should they change their idol, yet will never quit idolatry

itself, but transfer their prostrate worship, and their blind implicit adoration, to the golden image they adopt ; yet I fear them not in this kingdom at least, under the present Whig administration ; and above all, under the present Sovereign, who is by all men most justly esteemed for the excellence both of his public and private character, in war and peace.

I have dwelt thus at large upon the matters that compose this letter, because I am fully persuaded that the happiness both of King and Subject depends upon a due observance and reverence of the laws, and because I am willing, in particular, that my son should have an opportunity of perusing by himself my notions in this respect, when I shall be dead and gone. Young men, I know, are apt to be led away by the turn of the company they happen to fall in with, to admire the splendor and pomp of great men, and to swallow their doctrines too ; and to regard every thing like opposition as the effect of mere party or personal disappointment, and for that reason to laugh at all discourses upon liberty and the constitution, in the lump, as antiquated stuff, fit for no gentleman of the world to trouble his head about. Whereas, when he has lived so long as myself, he will see the necessity, every now and then, of bringing things back to their principles, and that there is nothing so mean, so corrupt, and so unprincipled, but what he may find some courtier of title, in a laced coat, and a gilt chariot, with a princely carriage and numerous retinue, will submit to do, in order to keep with the minister of the day, and be spoke to at St. James's. He will discover that those polite gentlemen who are of the *bon ton* and set the mode or true taste for the rest of the world, are as ignorant about the subject matter of this letter, as children. In short, a real acquaintance with the history of this country, and an insight into the constitution, by a general view of its laws, can only be had by a good deal of pains, reading and inquiry, and the reflection of a good understanding upon the whole. They are neither to be picked up in the streets like a girl of the town, or at routs, nor even at Arthur's, or Wildman's, nor are they to be had of a French or Italian master, or at a toyshop, nay not by confirmation from the hand of a Bishop, or even the hand of a Minister. It is infinitely easier to turn a polite period, in a letter about nothing, or to say a very genteel thing, than to think justly and speak clearly upon any subject of importance. Knowledge is not, that I know of, to be had by inspiration, excepting, perhaps,
sometimes

sometimes in religion ; and yet, unless a man really understands the matter in question, I do not see how he can, at any time, deal with a bold, dexterous fellow, that has an interest in deceiving him. He must rely upon the authority of some friend, and not trust to his own comprehension of arguments offered by orators. Of this, however, I think every Englishman may be assured, that the two real pillars of our constitution are Parliaments and Juries, and that in order to be what they ought to be, the former must be independent of the Crown, and the latter of the Judges, let the privileges be what they will that are requisite for this.

I am sorry to find my letter swell to such an enormous size, but it is the misfortune of age to be wordy and even to deal in tautology, and when the heart is full the mouth is apt to overflow. Peevishness, I can assure you, has not indicted a syllable, nor the attachment to a party; for I have as bad an opinion of many that are out, as any body can have of the motley actors that are in; and whenever the Crown-patentee or Master of the Theatre shall substitute other performers, I shall have little hopes from them after their first setting out, for most men then are ready to do somewhat; and, whenever this age happens, I hope some disinterested men will lay hold of the occasion for making some resolutions, and perhaps some laws that will be a security upon record for men much younger than myself, and for all our posterity. I have been tempted to throw out my loose thoughts from a true constitutional regard for his Majesty, whose crown can never sit easy when his people are discontented; and if, where all men allow the grievance, no remedy is applied by the Ministry, but things go on upon the old footing, I am really afraid that the time may come, which a great orator once printed, when his Majesty will not be able to sleep at St. James's for the cries of his injured people. I protest that my neighbours every now and then come about me, knowing I was once of the law, to ask what next will be done? Is it true, Sir, that such a thing has happened and that they intend to do so and so? What is practised against Wilkes (a sad debauched dog that used his wife ill it's true) may be practised against us? Pray, Sir, what advantage is there that art, treachery, or power could either invent, purchase or command, which has not been strained to the utmost, in order as it seems to compass indecision only, and that in a very plain matter, of universal consequence?

We none of us now know any more of the law about libels, warrants and commitments, than we did before; one man says one thing, and another man says another; and as to the letters in the *Gazetteer*, *pro* and *con*, we can neither make head or tail of them; there is so much said of both sides and so many distinctions made that we are never the wiser for what we read; if we could see but a short resolution or two in the printed votes of Parliament we should all of us know what to think upon the subject, but these great gentlemen we suppose are taken up with their party-disputes, and never consider us common tradesmen and inferior gentry at all. To which I can only say, that they must not so soon lose their patience, every thing I make no doubt will be properly settled by and bye, (even the High Stewardship of Cambridge.) I have heard that the Attorney General should say he was in hopes of having a solemn determination, not long first, upon these very points in some of the great courts of law, perhaps from Lord Mansfield; and that I thought it was very probable the Parliament would resume the consideration of the same matter and come to some satisfactory resolution thereupon; that the Ministry opposed such a resolution the last session because, perhaps, they might be glad to have a little more time to understand the matter, they might not perchance be men of very ready parts or quick genius, and they were too honest to decide any thing before they understood it, and that their having voted for the putting it off merely for four months had the appearance of the utmost tenderness and moderation in this regard; that they had besides many weighty affairs in hand and might possibly be a little prolix in their nature; but I was sure they meant well and had great reason to believe that they thought as the rest of the world did; in short that there was no room yet for people murmuring, it was not quite two years ago since the principal affair had happened, which was nothing at all in matters of law.

The Attorney, indeed, gives another turn to the matter, but I had not read his pamphlet when I made this answer to my neighbours. He says, that he really does not think the matter of much consequence; he allows the people in general were very uneasy and alarmed; but then he declares, that, till he had informed himself better, he “ expected to hear a regular system laid open, by
“ which an arbitrary administration had endeavoured to
“ overthrow the bulwark of our liberties, that the *privi-*
“ *lege*

“ *leges of Parliament* had been daringly violated ; that some
 “ *innovations* had been attempted to annihilate *Magna*
 “ *Charta*, the *Habeas Corpus*, or some other pillar of the
 “ constitution ; in short, that *some man* had been oppressed by arbitrary violence, tyranny, and persecution.”
 (His expression indeed is, *innocent man*, but I have left out that word as perfectly unnecessary, because a guilty man in this country is not to be knocked on the head, or tumbled into the river in a sack, before he be proved Guilty by due course of law, and *then* he is only to be executed as the judgment of the law shall direct ; for, the putting of any one to death, without the intervention or sanction of law, will be, at any time, and in any man who does it, *tyranny*, arbitrary violence, and murder.) Now, I need say nothing more to the Attorney upon the case of the man he points to, than I have done already, but, as to the other parts of law which he mentions, I will very frankly avow to him, that I think them very capital rights of an Englishman ; and he may see that I have treated them as such, and considered them as very materially interested, even in the case of the very man we have been conversing about. However, to oblige him, I will tell him some few of my thoughts upon these and some other legal points for him to think of by himself, or, if he pleases, to talk over with his superior ; altho’ I shall only touch them slightly in passing, and not launch out into all that the subject or the times suggest to my mind.

I have ever regarded the *Habeas Corpus*, both at Common Law and under the act of Charles the 2d, as the great remedial writs for the delivery of a freeman from unjust imprisonment, either by private violence or public tyranny, and even from just imprisonment, in every bailable case. For which reason I hope never to see such a writ trifled with ; and that if any lawyer should advise any officer of state to make a fallacious and inadequate return by saying *the prisoner was not in his custody*, when in truth he had been seized by his order, and in his hands, and was but just gone from thence, by *his* having sent him to *close* confinement, where no person could afterwards possibly get at him, in order to ground an application for a second *Habeas Corpus* : I should hope to see the vengeance of Parliament, so soon as the fact was known, lay hold of such Lawyer, and by its order commit his body to the same sort of durance, and then come to a resolution, that such return was a deliberate mockery of justice, and a most
 audacious

audacious perversion of the great law of Habeas Corpus, and make the same the ground work for a new declaratory and explanatory act upon this head, compelling the man who was served with it, to set forth what he had done with a prisoner, or what was become of him, if he had at any time been in his custody, and happened not to be so at the time that the writ was served upon him; and likewise compelling a Judge (as some sort of remedy against *close* confinement) to award a writ of Habeas Corpus upon the suggestion or motion of any man, who should only say that he believed his friend might be shut up in such a place (altho' he did not know, nor had ever heard, that he was) and that it was impossible for him to have admission there to ascertain the fact himself. Indeed; in my present way of thinking, it strikes me that such a return as that before stated, is false and untrue, because, whether I keep a man myself, or send him to any other person to keep, the law must consider him as still in my custody, *qui facit per alterum, facit per se*. I hope we shall never see any Chief Justice, especially in that great Court of criminal process, the *King's Bench*, who shall deny, or delay, the issuing one of these writs to any man who applies for it, but award the same instantly, upon the prayer of any one, as a writ of right to which the subject is intitled for asking, by motion of course without any affidavit whatsoever. In many cases, as, for example, in that of *close* confinement, it may be impossible for the party either to speak to a friend, send a letter, or make an affidavit, and consequently, if either be required by the court, it will be a virtual denial of the writ. It is a means of defeating the Habeas Corpus Act. The requisition of an affidavit puts it likewise in the power of a Judge to object to its form or contents, and to say the same is not full enough; and yet, before another can be had, the party guilty of the violence, upon being apprized of what has passed, may, by means of this delay, remove the prisoner to some other place, or shuffe him into some other hands, nay, hurry him into a ship and carry him to the East or West Indies, and then all attempt for redress will come too late, and be in vain. An application to the *King's Bench* for an Habeas Corpus in term-time, used to be esteemed, I remember, a mere motion of course. "Our inheritance is right of process of the law, as well as in judgment of the law." The condition of the subject would be still worse, if any Chief Justice, instead of granting the writ prayed for, should force
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the party into the taking of a rule upon the prisoner, to shew cause why he detained the person imprisoned; and this last miserable remedy would still be rendered less adequate, if the person applying was obliged to give notice of such rule to the Solicitor of the Treasury, as well as to the person imprisoning; and even this again would be still made more grievous, tedious and precarious, if the Judge should be critical upon the affidavit of the service of notice, and be extremely rigid in its being most punctually set forth, in every the minutest circumstance. What a noble field for delay, evasion and final disappointment, would this open to every committer of violence; and how easy would it be, in the mean time to dodge the man imprisoned from place to place, and from hand to hand, so as to render it utterly impracticable for any friend to procure his enlargement. A bold and daring minister, might thus easily transport a troublesome prating fellow, to either India, long before any cause could be shewn upon such a rule. I am informed, that a freeholder, pressed for a soldier under a temporary act of parliament, was two years obtaining his liberty under one of these rules; altho' he did his utmost by money and counsel, during all the time, to push on the hearing of his case upon the merits: Indeed, he had the great good fortune not to have his regiment removed farther than from Falmouth to Carlisle, in the whole time; for, had it been ordered abroad, I do not see how he could have had any relief at all, until the end of the war, before which he might have died of diseases, or been knocked on the head by the enemy. But it would be even still much worse, if any Judge should take it into his head for six weeks together, that noblemen were so great as to be privileged from paying obedience to a Habeas Corpus at all; in short, that a Peer could not be attached by the *King's Bench* for treating the court with opprobrious language, and threatening to shoot the person who executed their writ, if he did not withdraw from his presence; let them touch him if they dare, perhaps he *might* by-and-by write a *letter* to them.

What would the Attorney say, if any Chief Justice, in concert with an Attorney General, at the request of a foreign Embassador, should send a verbal order for detaining a man twenty-four hours, and for seizing his papers because he was printing something which his Excellency did not like; and there should never afterwards be any warrant

warrant granted, information filed, or prosecution intended; the sole end of the Embassador being answered by the getting the possession of the papers?

Or, if the legislature, after a violent opposition in the Commons, had passed an aristocratical act, with a view to prevent unequal matches, that is, to hinder property as much as possible from diffusing, by rendering all marriage between people under age, impracticable, unless upon certain conditions; contrary to the principles of population, liberty and commerce, which all require that as little restraint should be layed upon matrimonial connections or property as possible: a Chief Justice was to endeavour to carry such act farther than the legislature had done, and to extend its regulations to a country not named within it, to the disquiet and uneasiness of many people who had fled thither for the beneficial purpose of lawful marriage, according to their own inclinations; by throwing out his sentiments from the bench in disfavoured of the validity of such marriages, extrajudicially no match celebrated in that way having ever come in judgment before him.

Or, if any foreign soldier in this kingdom should be committed for felony, a lawyer in the service of the crown should be consulted thereupon, and he should advise a Secretary of State that he might, by letter in his Majesty's name, lawfully order the Mayor of the town, in whose prison such felon was, to discharge him without bail or mainprize, or even the consent or knowledge of the prosecutor, in order to prevent thereby the soldier from being tried by our laws for such felony.

Or, if any Chief Justice contrary to the usage of Judges, who are to have no ears for any thing that is to come in judgment before them, until the same is brought on judicially, should, weeks before any crown trial, officiously send for the proceedings to see whether they were legal, and, upon discovering an error on the prosecutor's side, should summon the Attorney of the other side, and tell him he must consent to the setting right of this error, to the end that the *tenor* of the pleading might be such as judgment could be pronounced thereupon; and, notwithstanding the Attorney should protest he could not consent thereto upon the account of his client, and that the same was a criminal prosecution, and that such alteration of the record, was not warranted by any adjudged precedent; should nevertheless arbitrarily direct it to be done, without
either

either having the point debated before himself by council, or brought on before the whole court for their opinion; and that the defendant being found guilty by the Jury, should be deprived by such amendment, of taking advantage of the error aforesaid, in arrest of judgment, which he might otherwise have done, and the same would have been fatal to the prosecutor.

Or, if any Chief Justice, notwithstanding the maxim forementioned, should make it a practice to send for Attornies and talk to them privately about their causes, and even read the briefs in them, in order to see such secrets of causes as are only confided to council, to be managed as they shall think proper, and by that means should frequently come into the court with a bias upon his mind.

Or, if a Chief Justice should tell a Secretary of State, for him to tell a foreign minister, that he need not be uneasy about such a particular man, for the term would come within three weeks, and that then *he* should be able to give judgment against the man, (a libeller convict) and that *he* intended to set a fine of 500 l. upon him, and to sentence him to two years imprisonment besides, if he did not make off; and that if he did, there would then be a riddance of him that way; so that his Excellency might be perfectly easy about him in all events.

Or, if any Chief Justice, upon the affidavit of an unlicensed alehouse-keeper, supported by a noble family, should entertain a complaint, accompanied with no imputation of corruption, against a Justice of Peace, who had acted upon a matter within his jurisdiction, and had only exercised that discretion which an act of parliament, gave him, and where his power was summary and final; and should at first threaten a rule for shewing cause why an information should not be awarded against such Justice of Peace, and should at last make a rule upon him to answer the matters of the affidavit, by way of terror.

Or, if any Chief Justice should, by unnecessary givings out from the Bench, endeavour to blast the repute of Juries with mankind.

Or, if any Law-privy-counsellor should, by way of introducing an arbitrary government in the plantations, lay it down to counsel as a principle, that *English* settlers by going from hence to people American colonies, thereby lost the privileges of Englishmen, and the benefit of the

English

English common law, and were to be governed ever after by the charter of the King, and by prerogative, and that the board would judge them accordingly ?

I say, if any of these things should happen, I should in my turn " be glad to know " what the Attorney, as a lawyer, would say to them. I will tell him very fairly, that from such premises, I think, old as I am, I could draw up a strong set of articles. For, what in a common man is a breach of the law, is also a breach of trust in a Judge, and where he obstructs justice and changes the law, it is treason at common law. It would, indeed, be very unhappy for the subjects of this country, if there were a man to whom any one of these things were applicable ; and the Lord have mercy upon the nation, if a time should ever come, when they shall all center in one and the same man. Being got thus far, I will ask him what opinion he would have of the veracity of a Judge, who, having tried an old gentleman for perjury, where there were four positive witnesses for the prosecutor, to the words being spoken which were charged, and which were probable in the nature of the case, and four witnesses for the defendant ; in short, his followers, who swore that they were very near their master, and must have heard the words had they been spoken, and they heard them not ; and that the Judge thereupon found it necessary to labor to the Jury the character and fortune of the defendant, and the utter improbability of his having denied upon oath, his having uttered the words, had he really uttered them ; and that after a good deal of hesitation and doubt, the Jury at last acquitted the defendant : I say, after such an acquittal, what would one think of a Judge, who should in a public assembly, wantonly and unnecessarily mention this case, and declare there was not the least colour or pretence for the prosecution ? What the Attorney may say, I know not, but I am sure, for my own part, I would never afterwards give such Judge any credit for any fact he should advance upon his own testimony only, however glád I might be to hear his reasoning upon any subject whatever.

I know it is a common reproach to the profession, that there is generally as much wit used by lawyers to pervert laws, as there is by the legislature to frame them. This, however, is no reproach to the Bar, but is undoubtedly the highest imputation on the Bench. Nothing, indeed, induces me to dwell so much upon lawyers, but a thorough conviction

conviction of the Incapacity of other men to discuss points of civil polity; for which reason the great lawyers have always been, and must ever be, the principal men in Parliament on constitutional debates, which are the most material of all to the happiness of the subject. The constitution, in truth, arises intirely out of the common law and acts of parliament, they constitute the bonds of society, and circumscribe both the power of the crown and the freedom of the individual. It is the preservation of this system in its due order which must continue us freemen; nothing else can. And such a horror have I of the introduction of any new *criminal* law into this country; that were it to happen, rather than to submit thereto, I should be even for accompanying a noble law-lord to *ultima Thule*, which, by the shiver with which he spoke it, I guess must be Scotland, the very northern scrag, or bleakest barebone of the Island. A man would fly any where in such case. Whilst our laws however continue unprofaned, lawyers will of course be considerable, their profession honourable; and the sons of the noble and best private families in the kingdom will be members of it. But, when civil liberty dies, by foreign or domestic invasion, the vocation of a lawyer will soon become equally mean among us, to what it actually is now in all foreign countries, where the monarch by the sword and the army lays down his will for law, and breaks through the forms of courts and their rules of justice whenever he pleases, and where, therefore, the profession of arms is alone held very distinguished, and indeed the only profession for gentlemen of honourable birth. But, as I never desire to see this sort of government take place here, so whatever I have said to the disreputation of lawyers must be applied to particulars, and not to the calling in general; for, as I know no greater public blessing than a wise and incorrupt supreme Judge, so I cannot form to myself a more detestable being than a false, artful and unprincipled chief magistrate of this sort. The true language in this country is that of a late famous minister, who said he would have it be known throughout his Majesty's dominions, that all Men, even the greatest Generals, were still to be subordinate to the civil Power. What therefore must be the weakness or the thoughtlessness of any civil minister who should endeavour, in public discourse, to lessen the reverence and respect of every Englishman towards his Judges, by treating their most solemn expositions of the law, delivered upon oath,

oath, as he would the profligate proceedings or abandoned votes of a motley crew of unsworn and ignorant election-men; or who should wantonly, in a great and ceremonious assembly, start a vulgar idea that tended to degrade any one of their judicial determinations to a level with the scoundrelly conversation of the liverymen of Peers. I will venture to say, that by debasing the reverend Judges you lend to raise a contempt for all civil government; and when the veneration for Judges and Laws shall once fall to the ground, neither Juries nor Parliaments will long survive, but they will all be delivered up to the mere discretion of the Prince, who will soon find it much easier and shorter to govern by his own will and pleasure, that is, by a privy-council and a standing army, and thus levy, without doubts or difficulties, whatever money, or execute whatever orders, he shall in his wisdom prescribe. One principal drift, therefore, of this my letter, is to let mankind see, from facts, who are, and who have been, when in power, in their several departments, the defenders of this noble and antient constitution, and who the perverters, violaters, and impugners, of the civil rights, laws and privileges, both of the people and their representatives. The goodness of his present Majesty will prevent any great excess in his time, altho' the laws should be so prostrated as to render it very practicable without punishment; but, who can answer for his successors? It will not be difficult, when once the law can be rendered subservient to a Ministry, for any cunning and selfish prince to find out a Solicitor for his Treasury, an Attorney-General for himself, and a Chief Justice for England, who shall devise means for grinding the face of the subjects, until they shall all be ground unto powder.

It is an inglorious, a disheartening, and a disadvantageous thing, without doubt, to have a successful war followed by an inadequate or insecure peace; but, in my humble opinion, the preservation of conquests is not, by any means, of so home a concern to any commonwealth, as the preservation of its constitution. Breaches of the latter, are the most melancholy and fatal forerunners of absolute slavery and ruin. And nothing can aggravate the misery of such a view, but to see the same men the invaders of domestic liberty, who have been the ceders of foreign acquisitions.

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It is the Attorney himself who has forced me to make these reflections, for he concludes with intimating, that we are " threatened with evils, which our united strength " can scarce avert ;" by which, I presume, he must mean another war. Now, if this be so, I am heartily sorry for it, I protest, from the bottom of my soul, and do therefore most sincerely concur with him in asking — " In " this situation, is it a time for private jealousies and private interests to consume the interval that peace affords us! To sow the seeds of diffidence, to revive the distinctions of party, and wantonly to sound the alarm of *privilege and prerogative*?" In my conscience it is not, and what ministers can mean by so doing, if they really intend the service of their royal master, I cannot conceive. I vow to God I am astonished at it!

Nor should I have thought of saying one half so much upon the subjects of this letter, were it not to vindicate the laws and the constitution from the attack made upon both by *The Defence of the Majority*, which (to use the words of old Milton) " As it is a particular disesteem of " every knowing person alive, and most injurious to the " written labours and monuments of the dead, so to me " it seems an undervaluing and vilifying of the whole nation." The main intent of his performance seems to me to be " a plot and practice, to alter and subvert the " frame and fabric of this commonwealth. He labours to " infuse into the conscience of his Majesty, the persuasion " of a power not bounding itself with laws, which King James calls tyranny. He endeavours to persuade the " conscience of the subjects, that they are bound to obey " commands illegal."

After saying this, I will take my final leave of the Attorney, having had proof enough of his fairness in argument, and his modesty in assertion; but, since he has talked so much of our distressed situation, both public and private, and in particular of the House of Commons, I hope I may have leave to apply to the present subject, what a great man *, a Tory too, said on another occasion,

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* Sir William Wyndham, father of the late E. of Egremont, and of the Hon. Mr. George Grenville, and Chancellor of the Exchequer for the Tories under Queen Anne. He was committed to the Tower for high treason in 1715; and delivered under the Habeas Corpus act in 1716; and his case under that statute was the great case urged in favour of Mr. Wilkes, when brought up

sion, and it shall be addressed to him in the words of the Book, (substituting only *measure* for *convention*, *adjournment* for *address*, and 14 for 28.)

“ Sir, I do not rise up, after so long a debate, to give
 “ you again my sentiments, but to express my great concern at what I have seen happen. In all the variety of
 “ company I have kept, I have never heard a single man
 “ without doors pretend to justify this measure; and when
 “ the sentiments of particulars were such, I did not expect, when they were met together in a body, to see a
 “ majority vote for it. This must be owing to one of
 “ these causes: either gentlemen were convinced by the
 “ arguments made use of in the House for justifying this
 “ measure, or there are other methods of convincing besides reason. I am not at liberty to suppose it the latter, therefore I must suppose it the former. But this,
 “ Sir, is to me a very melancholy consideration; for,
 “ though I have attended with the utmost regard to all
 “ that has been said upon this measure, I have not heard
 “ a single argument in its favour, that has had the least
 “ weight with me. This, I say, Sir, is a very melancholy consideration to me, since it makes me conclude,
 “ that I have not common sense, because I find I cannot
 “ be convinced by the strength of common reason. I am
 “ resolved to be directed by nothing but reason; and, as
 “ I must now conclude that I do not understand reason
 “ when I hear it, therefore I am resolved to retire. However, I must beg gentlemen to consider the consequences of the vote they are now to give. This Adjournment is intended to convince mankind that the measure
 “ now under consideration is a reasonable and an honorable measure for this nation; but if a Majority of 14,
 “ in such a full House, should fail of that success; if the
 “ people should not implicitly resign their reason to a
 “ vote of this House, what will be the consequence?
 “ Will not the Parliament lose its authority? Will it
 “ not be thought that, even in Parliament, we are governed by a faction? And what the consequences of this
 “ may be, I leave to those gentlemen to consider who
 “ are now to give their vote for this Adjournment. For
 “ my own part, I will trouble you no more, but with
 “ these

up by Habeas Corpus to the Common Pleas, in order to be delivered from a commitment to the Tower, by his son.

“ these my last words, “ I sincerely pray to Almighty
“ God, who has so often wonderfully protected these
“ kingdoms, that he will graciously continue his prote&ti-
“ on over them, by preserving us from that impend-
“ ing danger which threatens the nation from without,
“ and likewise that impending danger which threatens
“ our constitution from within.”

I am, Sir,

Westminster,
Oct. 17, 1764.

THE FATHER of CANDOR.

Libertas & Natale Solum.



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